CLERK'S COPY
P.V. 179
402909
Supt Ct

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

Blank Page

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX.

	Page
Proceedings before United States Board of Tax Appeals	1
Docket Entries—No. 80052	1
Docket Entries—No. 85961	3
Petition—No. 80052	6
Exhibit "A"—Notice of deficiency	16
Answer—No. 80052	28
Petition—No. 85961	30
Exhibit "A"—Notice of deficiency	35
Answer—No. 85961	46
Stipulation of facts—No. 80052 and No. 85961	48
Exhibit "A"—Federal income tax return for 1932	55
Exhibit "B"—Federal income tax return for 1933	60
Findings of facts and opinion—No. 80052 and No. 85961	68
Decision No. 80052	87
Decision No. 85961	88
Petition for review, with proof of service—No. 80052	89
Petition for review, with proof of service—No. 85961	100
Statement of evidence—No. 80052 and No. 85961	109
Caption	109
Statement of case in behalf of petitioner	110
Statement of case in behalf of respondent	110

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1940.

	Page
Proceedings before United States Board of Tax Appeals—Continued	
Statement of evidence—No. 80052 and No. 85961—Continued	
Testimony of Martin J. Dietz	113
Gustav Zimmerman	121
Orwill V. W. Hawkins	130
Stipulation re statement of evidence	133
Order approving statement of evidence	133
Petitioner's Exhibits:	
1—Notation as to leases	134
2—Diagrams	134
3—List of bonds purchased, 1932-1933	146
4—List of bonds sold, 1921	147
5—Correspondence	148
6—Petition in Case No. 12177	209
7—Amended answer in case No. 12177	219
8—Petition in Case No. 66072	225
Stipulation consolidating the record, approved November 10, 1939, by Learned Hand, C. J.	239
Praecipe for consolidated record	240
Certification of record	242
Proceedings in U. S. C. C. A., Second Circuit	243
Opinion, Patterson, J.	243
Judgment	245
Clerk's certificate	246
Order allowing certiorari	246

Docket Entries.

1

EUGENE HIGGINS,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent,

DOCKET No. 80052

APPEARANCES:

For Taxpayer:
ORWILL V. W. HAWKINS, ESQ.
HARRY H. WIGGINS, ESQ.

2

For Commissioner:
C. P. REILLY, ESQ.
E. M. WOOLF, ESQ.

1935

June 3—Petition received and filed. Taxpayer notified (fee paid).

June 3—Copy of petition served on General Counsel.

July 9—Answer filed by General Counsel.

July 13—Copy of Answer served on taxpayer.

3

1937

Oct. 15—Motion for circuit hearing at New York City filed by General Counsel.

Oct. 19—Hearing set Nov. 10, 1937 on motion.

Oct. 22—Motion for circuit hearing New York City, granted.

1938

Feb. 26—Hearing set beginning 4/25/38 in New York, N. Y.

Apr. 28—Hearing had before Mr. Disney on merits. Motion of petitioner to consolidate Dockets 80052 and 85961 for hearing, granted. Proceedings submitted. Stipu-

4

lation of facts filed. Entry of appearance of Harry H. Wiggins, Esquire, filed. Petitioner's brief due May 28, 1938; Respondent's brief due June 28, 1938. Reply 7/18/38.

May 21—Transcript of hearing of April 28, 1938 filed.

May 28—Request for findings of fact filed by taxpayer.

May 28—Brief filed by taxpayer. 5/31/38 copy served on General Counsel.

1939

Jan. 6—Motion for leave to file the attached brief, brief lodged, filed by General Counsel.

5

Jan. 6—Order receiving and filing respondent's brief as of January 6, 1939 and allowing petitioner to file his brief on Feb. 1, 1939, entered.

Jan. 30—Reply brief filed by taxpayer. 1/30/39 copy served on General Counsel.

May 24—Findings of fact and opinion rendered, Richard L. Disney, Div. #4. Decision will be entered under Rule 50.

June 21—Computation of deficiency filed by General Counsel.

June 23—Hearing set July 5, 1939 on settlement under Rule 50.

6

July 5—Hearing had before Mr. Sternhagen on Settlement under Rule 50. Respondent's computation uncontested. Referred to Mr. Disney for decision.

July 11—Decision entered, R. L. Disney, Div. 4.

Sept. 21—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Sept. 30—Proof of service filed by taxpayer.

Nov. 13—Copy of order from the United States Circuit Court of Appeals, Second Circuit, consolidating with Docket 85961 for record, briefing and that the record

consist of a single document entitled in both appeals, containing such matter as the parties designate in the praecipes, filed.

Nov. 13—Agreed statement of evidence lodged.

Nov. 14—Agreed statement of evidence approved and ordered filed.

Nov. 18—Agreed praecipe filed by taxpayer, with proof of service thereon.

Nov. 20—Order enlarging time to 12/11/39 to transmit and deliver record, entered.

Docket Entries.

EUGENE HIGGINS, *Petitioner,* against COMMISSIONER OF INTERNAL REVENUE, *Respondent,*	DOCKET NO. 85961

APPEARANCES:

For Taxpayer:
ORWILL V. W. HAWKINS, ESQ.
HARRY H. WIGGINS, ESQ.

For Commissioner:
C. P. REILLY, ESQ.
E. M. WOOLF, ESQ.

1936

Aug. 1—Petition received and filed. Taxpayer notified (fee paid).

Docket Entries.

Aug. 1—Copy of petition served on General Counsel.
Sept. 10—Answer filed by General Counsel.
Sept. 12—Copy of Answer served on taxpayer.
Sept. 14—Copy of Answer served on taxpayer. Corrected notice.

1937

Oct. 15—Motion for circuit hearing at New York City filed by General Counsel.
Oct. 19—Hearing set Nov. 10, 1937 on motion.
Oct. 22—Motion for circuit hearing New York City, granted.

1938

Feb. 26—Hearing set beginning 4/25/38 in New York, N. Y.
Apr. 28—Hearing had before Mr. Disney on merits. Motion of petitioner to consolidate Dockets 80052 and 85961 for hearing, granted. Proceedings submitted. Stipulation of facts filed. Entry of appearance of Harry H. Wiggins, Esquire, filed. Petitioner's brief due May 28, 1938; Respondent's brief due June 28, 1938. Reply due 7/13/38.
May 21—Transcript of hearing of April 28, 1938 filed.
May 28—Request for findings of fact filed by taxpayer.
May 28—Brief filed by taxpayer. 5/31/38 copy served on General Counsel.

1939

Jan. 6—Motion for leave to file the Attached brief, brief lodged, filed by General Counsel.
Jan. 6—Order receiving and filing respondent's brief as of January 6, 1939 and allowing petitioner to file his brief on Feb. 1, 1939, entered.
Jan. 30—Reply brief filed by taxpayer. 1/30/39 copy served on General Counsel.
May 24—Findings of fact and opinion rendered, Richard L. Disney, Div. 4. Decision will be entered under Rule 50.

Docket Entries.

June 21—Computation of deficiency filed by General Counsel.

June 23—Hearing set July 5, 1939 on settlement under Rule 50.

July 5—Hearing had before Mr. Sternhagen on Settlement under Rule 50. Respondent's computation uncontested. Referred to Mr. Disney for decision.

July 11—Decision entered, R. L. Disney, Div. 4.

Sept. 21—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Sept. 30—Proof of service filed by taxpayer.

Nov. 13—Copy of order from the United States Circuit Court of Appeals, Second Circuit, consolidating with Docket 80052 for record, briefing and that the record consist of a single document entitled in both appeals, containing such matter as the parties designate in the praecipes, filed.

Nov. 13—Agreed statement of evidence lodged.

Nov. 14—Agreed statement of evidence approved and ordered filed.

Nov. 18—Agreed praecipe filed by taxpayer, with proof of service thereon.

Nov. 20—Order enlarging time to 12/11/39 to transmit and deliver record, entered.

16

Petition.

UNITED STATES BOARD OF TAX APPEALS.

EUGENE HIGGINS, *Petitioner,* against COMMISSIONER OF INTERNAL REVENUE, *Respondent,*	DOCKET NO. 80052

17

Your petitioner hereby petitions for redetermination of the deficiency in 1932 income taxes asserted by the Commissioner of Internal Revenue in his notice of deficiency dated March 11, 1935, and as a basis for this proceeding alleges as follows:

I.

Petitioner is a citizen of the United States and his address is No. 50 Union Square East, New York, N. Y.

II.

18

Upon information and belief, that the Commissioner of Internal Revenue, to wit, on the 11th day of March, 1935, mailed to your petitioner a notice of deficiency in income taxes for the year 1932. A true copy of said notice is made a part hereof, annexed hereto and marked Exhibit A.

III.

That the taxes in controversy are 1932 income taxes with respect to which a deficiency is asserted against petitioner in the sum of $126,730.08.

IV.

Upon information and belief, that the determination of the tax set forth in the said notice of deficiency is based upon errors made by the Commissioner of Internal Revenue as follows:

1. The Commissioner of Internal Revenue erred in reducing the depreciation claimed by petitioner on the building owned by him at Nos. 554-556 West 43rd Street, New York, N. Y. by the sum of $125.00.

2. The Commissioner of Internal Revenue erred in reducing the amount claimed as a deduction from gross income by petitioner as a bad debt, to wit: loss of $30,000 on a bond secured by a mortgage on premises Nos. 554-556 West 43rd Street, New York, N. Y., foreclosed by petitioner during the year 1932, and by disallowing the same to the extent of $25,000.00.

3. The Commissioner of Internal Revenue erred in disallowing as a deduction from petitioner's gross income the sum of $500.00 given and contributed in 1932 by petitioner to The Crusaders, a corporation organized and operated exclusively for educational purposes.

4. The Commissioner of Internal Revenue erred in finding that petitioner had a profit in 1932 on the liquidation of Lackawanna Securities Co., and by adding to petitioner's gross income the sum of $122,231.10 claimed by said Commissioner to be the amount of petitioner's profit upon the liquidation of said Lackawanna Securities Co., and petitioner claims that he had no profit whatsoever in 1932 upon the liquidation of said company.

22

5. The Commissioner of Internal Revenue erred in finding and holding that the profit, if any there was, to this petitioner on the liquidation of the Lackawanna Securities Co., was taxable at normal and surtax rates.

6. The Commissioner of Internal Revenue erred in adding to petitioner's gross income the sum of $20,529.00 paid by Lackawanna Securities Co., on March 1, 1932, to petitioner as a cash dividend and in finding and holding that petitioner failed to account for said item in his return duly filed for the year 1932.

23

7. The Commissioner of Internal Revenue erred in disallowing as a deduction from petitioner's gross income the sum of $18,628.06, the equivalent of which in francs was paid by petitioner to the Government of France as income taxes in 1932.

8. The Commissioner of Internal Revenue erred in allocating a part of taxpayer's legal and office expense against petitioner's non-taxable income, all of which was interest paid on obligations of the Government, the States and their political subdivisions and particularly by disallowing de-
24 ductions from petitioner's gross income to the extent of $38,396.64, a part of the expenses paid by petitioner for legal and office expenses in the year 1932 in the conduct of his business.

9. The Commissioner of Internal Revenue erred in finding there was any deficiency whatsoever with respect to petitioner's income taxes for the year 1932.

10. The Commissioner of Internal Revenue erred in not finding there was an overassessment and overpayment with respect to this petitioner's income taxes for the year 1932.

11. The Commissioner of Internal Revenue erred in failing to allow the sum of $90.77 for depreciation on the taxpayer's office furniture and fixtures.

V.

The facts upon which petitioner relies as a basis of this proceeding are as follow:

1. That on May 12, 1932, petitioner was the owner of a bond wherein and whereby one Ferdinand Cohn promised to pay petitioner the sum of $50,000 on or before October 5, 1936 with interest at 5½% per annum secured by a mortgage on certain premises in the Borough of Manhattan, City, County and State of New York, known as Nos. 554-556 West 43rd Street.

2. Said Cohn having defaulted on his bond, petitioner on May 12, 1932 instituted an action in foreclosure in Supreme Court of New York which went to judgment on July 20, 1932, pursuant to which said premises were sold, by a Referee appointed for that purpose according to the law, practice and procedure in that Court, on the 16th day of August, 1932 to your petitioner for the sum of $20,000.

3. That there remained after the sale of said premises and on August 24, 1932, a deficiency on said bond of Cohn in the sum of $35,297.59 for which a judgment was duly entered against said Cohn on September 27, 1932 in the sum of $35,474.09, no part of which has ever been paid.

4. That execution on said judgment against said Cohn was duly issued to the Sheriff of Queens County, New York, where said Cohn then resided and was returned by the said

28

Sheriff unsatisfied in 1932 and said Cohn was then judgment proof and had no financial responsibility whatsoever.

5. That petitioner's claim and judgment against said Cohn became worthless in 1932 and petitioner in 1932 determined the same then to be worthless and then charged off the same as a loss.

6. That the buildings on said premises were erected in 1890 and were constructed of brick and stone and in 1932 had a remaining useful life of ten years.

29

7. That in 1932 petitioner made capital improvements on said premises and in doing so expended the sum of $6,428.73.

8. That The Crusaders Inc., to which petitioner made a contribution in 1932 of $500.00 is a New York Corporation organized and operating in 1932 exclusively for educational purposes, no part of the earnings of which inured to the benefit of any private stockholder or individual.

9. That petitioner was on June 15, 1921 the owner of

30

20,529 shares of stock of the Delaware, Lackawanna & Western Railroad Co., which in that year sold to the Glen Alden Coal Co., its coal properties for $60,000,000.00. Said Glen Alden Coal Co., paid for said properties by the delivery to said Delaware, Lackawanna & Western Railroad Co., $60,000,000.00 of its 4% gold bonds as the purchase price therefor. Subsequently and during the year 1921 the Delaware, Lackawanna & Western Railroad Company declared a 100% stock dividend thereby increasing petitioner's shares therein to 41,058 shares. By 1927 said Glen Alden Coal Co., had paid off its said bonds to the extent of

31

$1,500,000. and the Delaware, Lackawanna & Western Railroad Co., held the balance thereof, to wit, $58,500,000.00 in its treasury. On or about March 1927, the Delaware, Lackawanna & Western Railroad Company caused the Lackawanna Securities Co., to be organized in the State of Delaware and for its entire capital stock the Delaware, Lackawanna & Western Railroad Company transferred to it the said $58,500,000.00 of Glen Alden 4% gold bonds. Thereafter and in 1927, the Delaware, Lackawanna & Western Railroad Co., distributed the entire capital stock of said Lackawanna Securities Co., to its stockholders at the rate or in the proportion of ½ share thereof on each 32
share of Delaware, Lackawanna & Western Railroad Co., stock as a result of which petitioner received 20,529 shares. By 1932 said Glen Alden Coal Co., had reduced by payment its outstanding bonds held by the Lackawanna Securities Co., to $51,000,000. On or about August 2, 1932, the stockholders of Lackawanna Securities Co., adopted a resolution to put their said company into liquidation and to distribute to the stockholders its $51,000,000. Glen Alden 4% gold bonds in kind at the rate or in the proportion of a $1000.00 bond for each 16½ shares of its stock hold. Petitioner then still held his original 20,529 shares
of Lackawanna Securities Co., all of which he received 33
from the Delaware, Lackawanna & Western Railroad Co., as aforesaid, and upon which he became entitled to and received on August 18, 1932 4% gold bonds of Glen Alden Coal Co., of a par value of $1,244,181.82, all of which were a part of the identical obligation given in 1921 to Delaware, Lackawanna & Western Railroad Co., by Glen Alden Coal Co., for the coal properties purchased by it as aforesaid, and said bonds were of the reasonable value of $721,625.46 on August 18, 1932 and no more.

34

10. That petitioner received dividends in 1932 as follows:

Southern Pacific Company	$ 700.00
Delaware & Hudson R. R. Co.	540.00
Morris & Essex R. R. Co.	9,009.37
N. Y. Lackawanna & Western R. R.	14,725.00
Pitts. Ft. Wayne & Chicago R. R.	3,500.00
Lackawanna R. R. of N. J.	10,268.00
American Tel. & Tel. Co.	15,075.00
Lackawanna Securities Co.	20,529.00
	$74,346.37

35

and petitioner received no dividends other than as aforesaid in 1932.

11. That petitioner paid taxes in 1932 to the Government of France as follows:

Date Paid	Amount Paid	Nature of Tax
Feb. 10, 1932	frs. 35,000.	Direct tax
Feb. 17, 1932	frs. 259,750.	On income
July 25, 1932	frs. 53,827.80	Direct tax
July 25, 1932	frs. 46,172.20	On income
36 Dec. 6, 1932	frs. 3,246.12	Direct tax
Dec. 6, 1932	frs. 168,300.78	On income
Jan. 13, 1932	frs. 1,174.10	On automobiles
Apr. 20, 1932	frs. 1,174.10	
July 1932	frs. 1,174.10	
Oct. 1932	frs. 1,174.10	
	frs. 570,993.30	

12. That the value of frs. 570,993.30 converted at the appropriate rate of exchange is $22,426.30.

Petition.

13. That of the aforesaid items the following items, to wit:

frs. 259,750.	paid on	Feb. 17, 1932
frs. 46,172.20	paid on	July 25, 1932, and
frs. 168,300.78	paid on	Dec. 6, 1932

were imposed upon and paid by petitioner and computed pursuant to article 11, Sec. 2 of the Act of the French Republic dated July 15, 1914 which reads as follows:

> "En ce que concerne les personnes non domicilees en France, mais y possedant une ou plusiers residences, le revenu imposable est fixe a une somme egale a sept fois la valeur locative de cette ou de ces residences, a moins que les revenus tires par le contribuable de proprietes, exploitations ou professions, sises ou exercees en France n'atteignent un chiffre plus eleve, auquel cas ce dernier chiffre sert de base a l'impot."

which translated into the English language reads as follows:

> "With respect to persons not domiciled in France but having there one or more residences, the taxable income is fixed at a sum equal to seven times the rental value of that or of those residences unless the income received by the taxpayer from property, business or professions situated or carried on in France obtains a higher figure, in which event this last mentioned amount shall be the basis of the tax."

14. That petitioner during the entire year 1932 was an American citizen not domiciled in France but temporarily sojourning at Paris, France, where he at all times in 1932 maintained a residence and that said tax was fixed

40 and computed upon a sum of money established by the French Revenue authorities to be seven times the rental value of petitioner's said residence.

15. That petitioner was not in 1932 engaged in business in France and no income whatsoever was derived by petitioner from sources in that country.

16. That petitioner had and received during 1932 gross non-taxable income in the sum of $643,037.68 and no more, all of which was interest received on bonds and other obli-
41 gations of the United States and on bonds of several of the States of the United States and their political subdivisions, and petitioner's said holdings and the income therefrom are correctly described on the return filed by petitioner for the year 1932.

17. That all of said bonds and obligations were registered in the name of petitioner and were kept at all times in the personal custody of petitioner in a safe over which he alone had control save and except on rare special occasions when a temporary and limited power has been granted to others, to act expressly and in such limited
42 capacity for petitioner.

18. That no legal services were rendered to petitioner in 1932 in connection with any non-taxable securities or the income therefrom and that no part of petitioner's disbursements in 1932 for office expenses were expended in connection with any non-taxable securities and the services rendered by petitioner's employees in connection therewith was limited to the receipt of checks by mail for the interest on said non-taxable securities, the depositing thereof and the keeping of a record of said securities and the income received therefrom in petitioner's record books.

43

19. Said non-taxable securities were at all times managed entirely by petitioner.

20. That no part of petitioner's office and legal expenses is properly allocable to the income received by petitioner from non-taxable securities

21. That in May, 1922 petitioner purchased office equipment and paid therefor the sum of $907.00 for which he is entitled to deduct a depreciation of 10% thereof for the year 1932.

44

VI.

WHEREFORE, petitioner prays that this Board may grant him a hearing and redetermine petitioner's liability for income taxes for the year 1932 and in such redetermination that it find that there is no deficiency whatsoever for 1932 income taxes, and that petitioner is entitled to a refund in an amount to be determined upon the proofs to be submitted to the Board and that the Board grant such other and further relief as may, under the circumstances, be proper.

45

Respectfully submitted,

Dated, New York, N. Y., May 31, 1935.

ORWILL V. W. HAWKINS,
Attorney for Petitioner,
Office & P. O. Address,
No. 15 Broad Street,
Borough of Manhattan,
New York City, N. Y.

DUER, STRONG & WHITEHEAD, ESQS.,
Of Counsel.

Petition.

46

Exhibit A.

SN-A
MAR 11 1935

IT:AR:A-1
MLW-90D

Mr. Eugene Higgins,
50 Union Square, East,
New York, New York.

47 Sir:

You are advised that the determination of your income tax liability for the year(s) 1932, discloses a deficiency of $126,730.08 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

48

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P—7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period termi-

49

nates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) CHAS. T. RUSSELL
Deputy Commissioner.

Enclosures:
Statement
Form 870
1050M/mcc-3

50

STATEMENT

IT:AR:A-1
MLW-90D

In re: Mr. Eugene Higgins,
50 Union Square, East,
New York, New York.

51

INCOME TAX LIABILITY

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1932	$233,348.42	$106,618.34	$126,730.08

The deficiency shown herein is based on the report dated December 22, 1934, by Revenue Agent Leo Berman, and transmitted to you on January 26, 1935.

52

The tax liability has been determined as follows:

Net income reported on return		$247,392.63
Add:		
1. Reduction in depreciation allowance		125.00
2. Deduction for bad debt disallowed		25,000.00
3. Reduction in allowance for contributions		500.00
53 4. Profit on liquidation of Lackawanna Securities Co.		122,231.10
5. Dividends		20,529.00
6. Reduction in taxes paid		10,592.49
7. Reduction in office expenses		38,396.64
Net income revised:		$464,766.86
Less:		
Personal exemption	$ 1,000.00	
54 Dividends	94,875.37	
		95,875.37
Balance subject to normal tax		$368,891.49
Normal tax at 4% on $ 4,000.00		$ 160.00
Normal tax at 8% on $364,891.49		29,191.32
Surtax on $464,766.86		205,638.77
Total tax		$234,990.09

MLW/MCC - 3

55

Mr. Eugene Higgins,	Statement
Brought forward	$234,990.09
Less:	
Tax paid at source	1,641.67
Total tax assessable	$233,348.42
Tax assessed	106,618.34
Deficiency	126,730.08

EXPLANATION OF CHANGES

56

1. Depreciation of $500.00 claimed on a building at 554-556 West 43d Street, New York, New York, was based on a value of $25,000.00 and a rate of 4% for six months. The value has been determined to be $15,000.00 and a rate of 5% has been allowed.

2. A loss of $30,000.00 was claimed on the return, representing the difference between $50,000.00, the value of the first mortgage and $20,000.00 the price at which the property was acquired under foreclosure. The value of the property at the date of foreclosure has been determined to be $45,000.00 and the loss has accordingly been reduced from $30,000.00 to $5,000.00.

57

3. The deduction of $500.00 to The Crusaders, has been disallowed under the provisions of section 23 (n) of the Revenue Act of 1932.

4. and 5. A liquidating dividend of $5.95407 per share was paid in connection with the stock of Lackawanna Securities Co. on August 18, 1932. You held 20,529 shares. This profit is taxable at normal and surtax rates. A cash divi-

58 dend of $1.00 per share was paid on March 1, 1932. This item cannot be identified on your return, therefore, the net income subject to surtax has been increased by $20,529.00.

On August 18, 1932, there was distributed to the stockholders of Lackawanna Securities Co. one $1,000.00 bond of Glen Alden Coal Co. for each 16½ shares of stock of Lackawanna Securities Co.

The Bureau holds that the market value of the bonds on that date was 58¼.

59	Adjusted cost of 1 share of Lackawanna Securities on September 14, 1927	$29.26496
	Less: Nontaxable distribution from 1927 to 1932	9.916
	Adjusted cost	$29.34896

MLW/MCC-3

Mr. Eugene Higgins,	Statement
Brought forward	$ 29.34896
Liquidating dividend received in 1932:	
60 $1,000.00 divided by 16½ equals $60.60606 times 58¼ equals	35.30303
Taxable profit per share	$ 5.95407
20,529 shares times $5.95407 equals	$122,231.10

6. Taxes were paid to France in the amount of $22,426.30. Of this amount the sum of $18,628.06 has been disallowed, inasmuch as no evidence has been submitted relative to the amount of tax-exempt income included in the total upon which the tax was predicated. This ad-

61

justment has been made under the provisions of Income Tax Ruling #2294, published in Cumulative Bulletin V-2, page 62. The amounts disallowed are shown below:

Receipt	Francs	Rate	Dollars
#67969	259,750	.0394½	$10,247.14
#14474	168,300	.0390½	6,572.12
#65524	46,172.20	.0391¾	1,808.80

Amount disallowed	$18,628.06
Amount paid	22,426.30
Amount allowable	$ 3,798.24
Amount claimed	14,390.73
Amount disallowed on return	$10,592.49

62

7. The percentage of office and legal expenses applicable to tax exempt income has been disallowed as follows:

Gross taxable income	$636,593.99
Gross nontaxable income	643,037.68
Total	$1,279,631.67

63

$ 643,037.68 / $1,279,631.67 of $76,589.14 equals $ 38,487.41

MLW/MCC - 3

64 *Petition.*

Mr. Eugene Higgins, Amount disallowed	Statement $38,487.41
Less:	
Depreciation on office furniture	90.77
Balance disallowed	$38,396.64

Inasmuch as no reply has been received to Bureau letter dated February 12, 1935, this letter of final determination
65 is issued.

A copy of this letter has been furnished your attorneys Duer, Strong and Whitehead, 43 Exchange Place, New York, New York, in accordance with the authority conferred upon him by the power of attorney executed by you and on file in the Bureau.

MLW/MCC - 3

66

Petition.

67

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ORWILL V. W. HAWKINS, being duly sworn, deposes and says that he is one of the attorneys for the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by petitioner is that the petitioner is not within the United States, but is in Europe, 68
where he is temporarily residing in Paris, France. That the sources of deponent's information and the grounds of his belief with respect to the matters herein alleged are (receipts for foreign taxes paid by petitioner to the French Revenue authorities and) information given to deponent by employees in the offices maintained by petitioner in the City of New York. That this verification is made by deponent pursuant to the authority of a Power of Attorney to deponent and his partners heretofore given and granted, a true and notarial copy of which is annexed hereto, and deponent further says that said Power of Attorney has not been revoked. 69

O. V. W. HAWKINS.

Subscribed and sworn to before me }
this 31st day of May, 1935. }

GERARD T. SHEVLIN,
Notary Public, Queens Co. No. 1506.
Queens County Register's No. 5620.
Certificate filed in N. Y. Co. No. 461.
New York County Register's No. 7S284.
Commission expires March 30, 1937.

Petition.

70

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, GERARD T. SHEVLIN, a Notary Public in and for the County of Queens with certificate duly filed in the office of the Clerk of the County of New York

DO HEREBY CERTIFY that I have carefully compared the annexed Power of Attorney dated the 9th day of October, 1928, from EUGENE HIGGINS to MARSHAL STEARNS of New Canaan, Connecticut, SELDEN BACON of the City, County and
71 State of New York, HUGH MORGAN, JR., of West New Brighton, Richmond County, New York, and ORWILL V. W. HAWKINS of Lynbrook, Nassau County, New York, and the Consular Certificate of John R. Wood, Vice Consul of the United States of America at Paris, France, with the original of said Power of Attorney and said Consular Certificate and find the same to be a true and correct copy of said Power of Attorney and said Consular Certificate and of the whole thereof.

WITNESS my hand and Notarial Seal this 29th day of May, 1935.

72

GERARD T. SHEVLIN,
GERARD T. SHEVLIN,
Notary Public, Queens Co. No. 1506.
Queens County Register's No. 5620.
Certificate filed in N. Y. Co. No. 461.
New York County Register's No. 7S284.
Commission expires March 30, 1937.

(SEAL)

Petition.

73

KNOW ALL MEN BY THESE PRESENTS, That I, EUGENE HIGGINS of 7. Place d'Iena, in the City of Paris, Republic of France, have made constituted and appointed, and by these presents, do make, constitute and appoint MARSHAL STEARNS, of New Canaan, Connecticut, SELDEN BACON, of the City, County and State of New York, HUGH MORGAN JR., of West New Brighton, Richmond County, New York, and ORWILL V. W. HAWKINS, of Lynbrook, Nassau County, New York, or any of them, to be my true and lawful attorneys for me and in my name, place and stead, to execute and file in my behalf amended returns, reports, claims for abatement, claims for refund, claims for credit, and any and all protests, claims and other papers or documents, which may in any way affect or have any connection with any and all income tax returns heretofore or hereafter filed by or for me and all income taxes at any time paid by me for the years covered by said returns or any additional income taxes claimed to be due under said income tax returns or on account of income taxes covered by said returns, under the provisions of the Revenue Laws or other Statutes of the United States, and to appear for me before the Commissioner of Internal Revenue of the United States and any Board, Bureau, officers or other Representatives of the Government of the United States or of any of its Departments in connection with any of the aforesaid matters and to attend conferences, prepare and submit briefs and make arguments in my behalf in connection therewith, to take appeals on my behalf to the United States Board of Tax Appeals relating to the aforesaid and sign the petition on said appeal, and any and all documents in any way connected with said appeal and to appear before said Board of Tax Appeals in my behalf, submit briefs, make arguments and do all and everything in any way connected or

74

75

76 relating to such an appeal and to receive and collect refunds and reclaims arising out of any of the aforesaid matters.

For better and more effectually executing the powers and authorities aforesaid, to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do, if personally present at the doing thereof, hereby ratifying and confirming all that my said attorneys or any of them shall lawfully do or cause
77 to be done by virtue hereof. This authority to remain in full force until revoked by me.

In witness whereof, I have hereunto set my hand and seal the Ninth day of October, in the year of Our Lord, one thousand nine hundred and twenty-eight.

Eugene Higgins (L.S.)

78

Petition.

79

CONSULATE GENERAL OF THE UNITED STATES
CITY OF PARIS, REPUBLIC OF FRANCE } ss.:

BE IT KNOWN, That on this Ninth day of October, Nineteen hundred and twenty-eight, at the American Consulate General of the United States of America, before me John R. Wood Vice Consul of the United States of America, dwelling in the City of Paris, France personally came and appeared EUGENE HIGGINS, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

80

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Consular Seal of the United States of America, at the City of Paris, France the day and year last above written.

JOHN R. WOOD
John R. Wood
Vice Consul of the United States
of America at Paris France

(Seal

81

American Consulate
General Paris, France)
11818
No Fee Prescribed

82

Answer.

UNITED STATES BOARD OF TAX APPEALS.

EUGENE HIGGINS,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent,
No. 80052

83

Comes now the respondent by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and in answer to the petition of the petitioner, admits, denies and alleges as follows:

I, II and III. Admits the allegations contained in paragraphs one, two and three of the petition.

IV. Denies that the Commissioner erred as alleged in sub-paragraphs (1) to (11) inclusive of paragraph four of the petition.

84

V. Denies the allegations contained in sub-paragraphs (1) to (8) inclusive of paragraph five of the petition.

(9). Admits that in 1932 petitioner was the owner of 20,529 shares of capital stock of Lackawanna Securities Company. Admits that petitioner on August 18, 1932 received in distribution from said Lackawanna Securities Company 4 per cent gold bonds of Glen Alden Coal Company of a par value of $1,244,181.82. Except as admitted herein respondent denies the allegations contained in sub-paragraph (9) of paragraph five of the petition.

Answer.

85

(10) Admits that petitioner received dividends in 1932 as alleged in paragraph five (10) of the petition, but denies that he received no dividends other than those in 1932.

(11) to (21) inclusive. Denies the allegations contained in sub-paragraphs (11) to (21) inclusive of paragraph five of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal of the petitioner be denied.

86

(Signed) ROBERT H. JACKSON.
Assistant General Counsel
for the
Bureau of Internal Revenue

Of Counsel:
DEWITT M. EVANS
JOHN M. MORAWSKI
Special Attorneys
Bureau of Internal Revenue

87

88

Petition.

UNITED STATES BOARD OF TAX APPEALS.

EUGENE HIGGINS, *Petitioner,* against COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	DOCKET NO. 85961

89 Your Petitioner hereby petitions for redetermination of the deficiency in 1933 income taxes asserted by the Commissioner of Internal Revenue in his notice of deficiency dated June 16, 1936, and as a basis for this proceeding alleges as follows:

I.

Petitioner is a citizen of the United States and his address is No. 50 Union Square East, New York City, N. Y.

II.

90 Upon information and belief, that the Commissioner of Internal Revenue, to wit, on the 16th day of June, 1936, mailed to your petitioner a notice of deficiency in income taxes for the year 1933. A true copy of said notice is annexed hereto, made a part hereof and marked Exhibit A.

III.

That the taxes in controversy are 1933 income taxes with respect to which a deficiency is asserted against the petitioner in the sum of Twenty-four thousand five hundred forty-two and 65/100 Dollars ($24,542.65).

IV.

Upon information and belief, that the determination of the tax set forth in the said notice of deficiency is based upon errors made by the Commissioner of Internal Revenue as follows:

1. The Commissioner of Internal Revenue erred in reducing the depreciation claimed by the petitioner on the buildings owned by him at Nos. 554-556 West 43rd Street, New York City, N. Y., by the sum of Two hundred fifty dollars ($250), when he should instead have increased the depreciation.

2. The Commissioner of Internal Revenue erred in disallowing as a deduction from petitioner's gross income the sum of Two hundred fifty Dollars ($250) given and contributed in 1933 by petitioner to Association against the Prohibition Amendment, a corporation organized and operated exclusively for educational purposes.

3. The Commissioner of Internal Revenue erred in allocating a part of petitioner's legal and office expenses against petitioner's non-taxable income, all of which was interest paid on obligations of the Government, the States and their political subdivisions, and particularly by disallowing deductions from petitioner's gross income to the extent of Forty-eight thousand eight hundred two and 35/100 Dollars ($48,802.35), a part of the expenses paid by petitioner for legal and office expenses in the year 1933 in the conduct of his business.

4. The Commissioner of Internal Revenue erred in finding there was any deficiency whatsoever with respect to petitioner's income taxes for the year 1933, and further erred by not finding there was an overassessment.

94 *Petition.*

V.

The facts upon which the petitioner relies as the basis for this proceeding are as follows:

1. (a) The buildings on said premises Nos. 554-556 West 43rd Street, City of New York, were erected in 1890.

(b) The buildings on said premises Nos. 554-556 West 43rd Street, City of New York, are constructed of brick and stone.

95

(c) The buildings on said premises Nos. 554-556 West 43rd Street, City of New York, which were deeded in 1932 to the petitioner upon the foreclosure of a purchase money mortgage, had a remaining useful life of ten years at the time of acquisition.

(d) The buildings on said premises Nos. 554-556 West 43rd Street, City of New York, at the time of said acquisition, were in a very dilapidated condition and it was necessary to expend and petitioner did spend Nine thousand thirty-nine and 03/100 Dollars ($9,039.03) on said premises
96 to put them in good condition, and of the said sum the petitioner expended Six thousand four hundred twenty-eight and 73/100 Dollars ($6,428.73) in 1932 for capital improvements on said premises.

2. (a) Association Against the Prohibition Amendment was incorporated in the District of Columbia, and was organized and operating in 1933 exclusively for educational purposes, no part of the earnings of which enured to the benefit of any private stockholder or individual.

3. (a) Petitioner received during the year 1933 gross non-taxable income in the sum of Six hundred fifty-four thousand seven hundred ninety-one and 14/100 Dollars ($654,791.14) and no more, all of which was interest received upon bonds and other obligations of the United States and on bonds of several of the States of the United States and their political subdivisions.

(b) All of said bonds and obligations were registered in the name of petitioner.

(c) Eight million three hundred fifty-three thousand Dollars ($8,353,000) of said tax-exempt securities, only slightly less than one-half of all of said tax-exempt securities, were contained throughout the year 1933 in a safe deposit box maintained by petitioner in the City of New York, and over which petitioner alone had access.

(d) The balance of said tax-exempt securities, to wit, in the sum of Eight million nine hundred twenty-five thousand Dollars ($8,925,000) were kept in another safe deposit box maintained by petitioner in the City of New York, to which two deputies had joint access, but said deputies were without authority in any way to handle said tax-exempt securities contained therein except upon specific directions by taxpayer given.

(e) No tax exempt securities were sold by petitioner during the year 1933.

(f) No legal services were rendered to petitioner in 1933 in connection with any of said non-taxable securities or the income therefrom.

100 (g) No part of petitioner's disbursements in the year 1933 claimed for office expenses were expenses in connection with any non-taxable security.

(h) The services rendered by petitioner's employees in connection with said tax-exempt securities were limited solely to the receipt of checks by mail for the interest on said non-taxable securities, the deposit thereof, and the keeping of a record of said securities and the income received therefrom in taxpayer's record books.

101 (i) Said non-taxable securities were at all times managed exclusively by petitioner.

WHEREFORE petitioner prays that this Board may grant him a hearing and determine petitioner's liability for income taxes for the year 1933, and in such determination that it find that there is no deficiency whatsoever due from the petitioner for 1933 income taxes, and that petitioner is entitled to a refund in an amount to be determined upon the proofs to be submitted to the Board, and that the Board grant such other and further relief as may, under the circumstances, be proper.

102

Dated, New York, N. Y. July 31, 1936.

Respectfully submitted,

ORWILL V. W. HAWKINS,
Attorney for Petitioner,
Office & Post Office Address,
No. 15 Broad Street,
Borough of Manhattan,
New York City, N. Y.

DUER, STRONG & WHITEHEAD, Esqs.,
Of Counsel.

Petition. 103

Exhibit A.

1050 M SN-A

Jun 16 1936

IT:AR:A-2
ABB-90D

Mr. Eugene Higgins,
50 Union Square, East,
New York, New York. 104

Sir:

You are advised that the determination of your income tax liability for the taxable year (x) 1933 discloses a deficiency of $24,542.65, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. 105

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the

106

interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) CHAS. T. RUSSELL
Deputy Commissioner.

Enclosures:
107 Statement
Form 870

ABB/DEC - 1

STATEMENT

IT:AR:A - 2
ABB-90D

In re: Mr. Eugene Higgins,
50 Union Square, East,
108 New York, New York.

INCOME TAX LIABILITY

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1933	$133,189.51	$108,646.86	$24,542.65

The deficiency shown herein is based upon the repor dated June 29, 1935 prepared by Internal Revenue Agen

John J. Crowley, Jr., a copy of which was transmitted to you under date of August 6, 1935.

Your net income and tax liability have been revised as follows:

Net income reported on your return		$248,746.63
Add:		
1. Rents	$ 250.00	
2. Contributions	250.00	
3. Other deductions disallowed	48,802.35	
Total increase	$49,302.35	
Deduct:		
4. Taxes allowed	6,987.42	42,314.93
Revised net income		$291,061.56
Less:		
Dividends	$52,577.38	
Personal exemption	1,000.00	53,577.38
Balance subject to normal tax		$237,484.18
Normal tax at 4% on $ 4,000.00		$ 160.00
Normal tax at 8% on $233,484.18		18,678.73
Surtax on $291,061.56		116,490.78
Total tax		$135,329.51

Mr. Eugene Higgins — Statement

Brought forward $135,329.51

112

Less:	
Tax paid at source	2,140.00
Net tax	$133,189.51
Tax assessed, Account #200653	108,646.86
Deficiency	$ 24,542.65

EXPLANATION OF CHANGES

113 1. The revenue agent has been sustained in his adjustment of depreciation on rental property located at 554-6 West 43rd Street, New York, New York. The history of real estate in that location appears to justify the conclusion reached by the revenue agent that this property would have a remaining life of twenty years after 1932 if kept in such a state of repair as is reasonable and usual in rental properties.

2. It is noted that you claimed a deduction of $250.00 on your return for a contribution made to "Capt. Stayton Repeal Fund." This contribution is not allowable under the provisions of 23 (n) of the Revenue Act of 1932.

114 In your protest dated August 27, 1935, reference is made to the disallowance of a contribution of $250.00 made to the Crusaders Incorporated, a New York corporation. In substantiation of your claim for this corporation there was submitted a copy of the Articles of Incorporation of The Crusaders. This latter corporation was formed under the laws of the State of Ohio. Due to the fact that no contribution to The Crusaders was claimed on your return, or disallowed by the revenue agent, no adjustment has been made.

The deduction claimed on your return for business expenses has been allowed to the extent of $25,699.91.

115

Section 23 (a) of the Revenue Act of 1932 provides that in computing net income there shall be allowed as deductions:

Mr. Eugene Higgins Statement

"All the ordinary and necessary expenses paid or incurred in the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the 116
entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

The evidence on file indicates that you are not engaged in a trade or business within the meaning of section 23 (a) quoted in part above.

Income Tax 2751, published in Cumulative Bulletin XIII-1, on page 43, holds as follows: 117

"The ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection, and conservation of properties producing taxable income are deductible from gross income."

This ruling must be interpreted by its plain language to disallow the deductions applicable to nontaxable income.

General Counsel's Memorandum 9954, published in Cumulative Bulletin X-2, 253, holds that where a taxpayer has both exempt and taxable income, only that portion of the deductions which is attributable (on a basis of pro rata

118 allocation) to the taxable income should be allowed in the computation of net taxable income. This ruling was modified by G.C.M. 19123, published in C.B. X-2, page 254, in which it was held that G.C.M. 9954, supra, does not apply to situations involving expenses incurred in the collection of interest on bonds or other obligations of the United States or its possessions, or interest on bonds or other obligations of a State, territory or political subdivision thereof, or to other situations not within the scope of the facts involved in Lewis v. Commissioner, 47 Fed. (2d) 32, published as Court Decision 359, in C.B. X-2, on page 342.

119

Mr. Eugene Higgins Statement

It is noted that you received interest of $654,791.14 from tax-exempt securities. Although some of these securities were kept in a safe deposit box to which you only had access, it is reasonable to assume that the records of your office reflected the collection of this income, and required the services of your office employees.

4. A deduction of $27,877.13 has been allowed for taxes instead of $21,126.15, the amount claimed on your return.
120 This increase of $6,750.98 represents an adjustment of French taxes.

Careful consideration has been accorded your protest dated August 27, 1935, against the findings of the examining officer, the affidavits you furnished and the information submitted at conferences held in the office of the internal revenue agent in charge on September 19, 1935 and in this office on May 6, 1936.

A copy of this letter has been mailed to your representative. Mr. Orwill V. W. Hawkins, 15 Broad Street, New York, New York, under authority of a power of attorney executed by you and on file in the Bureau.

ABB/DRC-1

121

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ORWILL V. W. HAWKINS, being duly sworn, deposes and says that he is one of the attorneys for the petitioner herein; that he has read the foregoing petition and knows the contents thereof: that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by petitioner is that the petitioner is not within the United States, but is in Europe, where he is 122
temporarily residing in Paris, France. That the sources of deponent's information and the grounds of his belief with respect to the matters herein alleged are information given to deponent by employees in the offices maintained by petitioner in the City of New York. That this verification is made by deponent pursuant to the authority of a Power of Attorney to deponent and his partners heretofore given and granted, a true and notarial copy of which is annexed hereto, and deponent further says that said Power of Attorney has not been revoked.

ORWILL V. W. HAWKINS. 123

Subscribed and sworn to before me }
this 31st day of July, 1936. }

WILLIAM G. PHILLIPS,
Notary Public.
Nassau Co. N. Y. No. 992.
Certificate filed in N. Y. Co. No. 148.
N. Y. County Register's No. 8-P-92.
My Commission expires March 30, 1938.

Petition.

124

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, WILLIAM G. PHILLIPS, a Notary Public in and for the County of Nassau with certificate duly filed in the office of the Clerk of the County of New York

DO HEREBY CERTIFY that I have carefully compared the annexed Power Attorney dated the 9th day of October, 1928, from EUGENE HIGGINS to MARSHAL STEARNS of New Canaan, Connecticut, SELDEN BACON of the City, County and State of
125 New York, HUGH MORGAN, JR., of West New Brighton, Richmond County, New York, and ORWILL V. W. HAWKINS of Lynbrook, Nassau County, New York, and the Consular Certificate of John R. Wood, Vice Consul of the United States of America at Paris, France, with the original of said Power of Attorney and said Consular Certificate and find the same to be a true and correct copy of said Power of Attorney and said Consular Certificate and of the whole thereof.

WITNESS my hand and Notarial Seal this 31st day of July, 1936.

126 WILLIAM G. PHILLIPS,
Notary Public.
Nassau Co. N. Y. No. 992.
Certificate filed in N. Y. Co. No. 148.
N. Y. County Register's No. 8-P-92.
My Commission expires March 30, 1938.

Petition.

127

KNOW ALL MEN BY THESE PRESENTS, That I, EUGENE HIGGINS of 7 Place d'Iena, in the City of Paris, Republic of France, have made constituted and appointed, and by these presents; do make, constitute and appoint MARSHAL STEARNS, of New Canaan, Connecticut, SELDEN BACON, of the City, County and State of New York, HUGH MORGAN, JR., of West New Brighton, Richmond County, New York, and ORWELL V. W. HAWKINS, of Lynbrook, Nassau County, New York, or any of them, to be my true and lawful attorneys for me and in my name, place and stead, to execute and file in my behalf amended returns, reports, claims for abatement, claims 128
for refund, claims for credit, and any and all protests, claims and other papers or documents, which may in any way affect or have any connection with any and all income tax returns heretofore or hereafter filed by or for me and all income taxes at any time paid by me for the years covered by said returns or any additional income taxes claimed to be due under said income tax returns or on account of income taxes covered by said returns, under the provisions of the Revenue Laws or other Statutes of the United States, and to appear for me before the Commissioner of Internal Revenue of the United States and any Board, Bureau, officers or other Representatives of the Government of the United 129
States or of any of its Departments in connection with any of the aforesaid matters and to attend conferences, prepare and submit briefs and make arguments in my behalf in connection therewith, to take appeals on my behalf to the United States Board of Tax Appeals relating to the aforesaid and sign the petition on said appeal, and any and all documents in any way connected with said appeal and to appear before said Board of Tax Appeals in my behalf, submit briefs, make arguments and do all and everything in any way connected or relating to such an appeal and to receive and collect re-

130 funds and reclaims arising out of any of the aforesaid matters.

For better and more effectually executing the powers and authorities aforesaid, to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do, if personally present at the doing thereof, hereby ratifying and confirming all that my said attorneys or any of them shall lawfully do or cause to be done by virtue hereof. This authority to remain in full force
131 until revoked by me.

In witness whereof, I have hereunto set my hand and seal the Ninth day of October, in the year of Our Lord, one thousand nine hundred and twenty-eight.

Eugene Higgins (L.S.)

132

Petition.

133

CONSULATE GENERAL OF THE UNITED STATES }
CITY OF PARIS, REPUBLIC OF FRANCE } ss.:

BE IT KNOWN, That on this Ninth day of October Nineteen hundred and twenty-eight, at the American Consulate General of the United States of America, before me John R. Wood Vice Consul of the United States of America, dwelling in the City of Paris, France personally came and appeared EUGENE HIGGINS, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

134

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Consular Seal of the United States of America, at the City of Paris, France, the day and year last above written.

JOHN R. WOOD
JOHN R WOOD
Vice Consul of the United States
of America at Paris, France.

(Seal

135

American Consulate General
Paris, France)
11818
No Fee Prescribed

136

Answer.

UNITED STATES BOARD OF TAX APPEALS.

EUGENE HIGGINS, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 85961

137

Comes now the respondent by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and in answer to the petition of the petitioner, admits, denies and alleges as follows:

I. Admits the allegations contained in paragraph one of the petition.

II. Admits the allegations contained in paragraph two of the petition.

III. Admits the allegations contained in paragraph
138 three of the petition.

IV. Denies that the Commissioner erred as alleged in paragraph four, sub-paragraphs 1, 2, 3 and 4 of the petition.

V. 1 (a), (b), (c), (d) and 2 (a) Denies the allegations contained in sub-paragraphs 1 (a), (b), (c), (d) and 2 (a) of paragraph five of the petition.

V. 3 (a) Admits that petitioner received during the year 1933 non-taxable income in the sum of $654,791.14.

139

representing interest received upon bonds and other obligations of the United States and on bonds of several of the States of the United States and their political subdivisions, but denies the remaining allegations contained in sub-paragraph 3 (a) of paragraph five of the petition.

V. 3 (b) to (i) inclusive. Denies the allegations contained in sub-paragraphs 3 (b) to (i) inclusive of paragraph five of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

140

WHEREFORE, it is prayed that the petitioner's appeal be denied and the Commissioner's determination of deficiency by approved.

(Signed) HERMAN OLIPHANT.
HERMAN OLIPHANT
General Counsel
for the
Department of the Treasury

141

Of Counsel:
DEWITT M. EVANS
JOHN M. MORAWSKI
Special Attorneys
Bureau of Internal Revenue

142

Stipulation of Facts.

UNITED STATES BOARD OF TAX APPEALS.

[SAME TITLE]

DOCKET NO. 80052
DOCKET NO. 85961

IT IS HEREBY STIPULATED AND AGREED by and between the
143 parties hereto, by their respective counsel, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further testimony not inconsistent with the facts herein stipulated to be true.

1. The petitioner is an individual and a citizen of the United States, and he maintains an office for the conduct of his affairs at 50 Union Square, New York, New York. During the whole of the taxable years 1932 and 1933, the petitioner was abroad where he maintained another office in Paris, France.

144 2. Docket No. 80052 involves the petitioner's Federal income tax liability for the taxable year 1932, and Docket No. 85961 involves the petitioner's Federal income tax liability for the taxable year 1933.

3. Attached hereto and marked "Exhibit A" is the petitioner's Federal income tax return for the year 1932. Attached hereto and marked "Exhibit B" is the petitioner's Federal income tax return for the year 1933.

4. On March 11, 1935, the Commissioner mailed a notice of deficiency to the petitioner covering the taxable

145

year 1932. A true copy of said notice of deficiency is attached to the petition (Docket No. 80052) which shall be deemed before the Board.

On June 16, 1936, the Commissioner mailed a notice of deficiency to the petitioner covering the taxable year 1933. A true copy of said notice of deficiency is attached to the petition (Docket No. 85961) which shall be deemed before the Board.

5. Within the time allowed by law, the petitioner filed with the Board of Tax Appeals a petition for each of the years 1932 and 1933, contesting the deficiencies asserted by the Commissioner in the aforesaid notices of deficiency.

146

6. All of the issues raised in the petition for the year 1932 (Docket No. 80052) have been settled to the satisfaction of both the petitioner and the Commissioner except the issue designated in said petition in subparagraph 8 of paragraph IV.

All of the issues raised in the petition for the year 1933 (Docket No. 85961) have been settled to the satisfaction of both the petitioner and the Commissioner except the issue designated in said petition as subparagraph 3 of paragraph IV.

147

7. On Line 18 of his 1932 income tax return, the petitioner claimed a deduction in the amount of $76,498.37 as ordinary and necessary expenses under section 23 (a) of the Revenue Act of 1932. The Commissioner in the notice of deficiency disallowed $38,487.41 of said $76,498.37 and allowed as a deduction for ordinary and necessary expenses $38,101.73 (which included an item of $90.77 for depreciation on office furniture which had not been claimed in the return). The propriety of the Commissioner's

148 *Stipulation of Facts.*

action in refusing to allow the whole of the amount $76,498.37 plus $90.77 for said depreciation as ordinary and necessary expenses is the only issue now in controversy before the Board for the year 1932.

8. The details of the items constituting the claimed deduction of $76,498.37 for 1932 are as follows:

SALARIES:

William S. Whitehead, New York Office Manager and member of the Board of Control	$12,400.00
Gustav Zimmermann, Bookkeeper and member of the Board of Control	$10,400.00
Martin J. Dietz, in charge of real estate	$ 9,750.00
Marshal Stearns, authorized Attorney-in-Fact and Member of the Board of Control	$ 4,000.00
B. Besenbeck, Clerk and Stenographer	$ 1,950.00
D. P. Cousteau, Secretary to Mr. Higgins	$ 9,000.00
Total	$47,500.00

149

LEGAL EXPENSES:

Services in connection with claim for additional income taxes for 1921	$ 3,000.00	
Disbursements for cable and telephone charges in connection with the above	139.02	
Services rendered in connection with real estate leases which involved preparation of leases, examination of titles, agreements with tenants, suits for rent, action to dispossess tenants, negotiations with tenants and their attorneys, and advice generally with respect to such matters	12,000.00	

150

Disbursements for search, filing fee and court fees	100.69	
Services involving examination and approval of Federal and New York income tax returns and incidental advice with respect to income taxes	1,000.00	
Disbursements as to above for cables	11.50	
Advice with respect to investments in certain stocks involving investigations, examination of financial statements and recommendations	1,500.00	
Services with respect to personal matters	2,500.00	
Disbursements as to personal matters	113.04	$20,414.25
Rent		$ 4,624.98
Stationery		287.69
Radiograms		476.05
Postage		150.60
Petty Cash		70.00
Newspapers		189.57
PARIS OFFICE EXPENSES:		
Lawyers Fees	$ 1,058.36	
Cablegrams	213.76	
Consular Fees and Stamps	12.08	
Stationery and Postage	47.07	1,331.27
Depreciation on Paris Office Building 2%		600.00
Miscellaneous		853.96
Total		$76,498.37

154 The entire sum of $76,498.37 was expended by taxpayer in the year 1932 for the items detailed above except for the sum of $600 which was not an expenditure but is the amount of depreciation on the taxpayer's Paris office building.

9. On line 18 of his 1933 income tax return, the petitioner claimed a deduction in the amount of $74,502.26 as ordinary and necessary expenses under section 23 (a) of the Revenue Act of 1932. The Commissioner in the notice of deficiency disallowed $48,802.35 of said $74,502.26 and
155 allowed as a deduction for ordinary and necessary expenses $25,699.91. The propriety of the Commissioner's action in refusing to allow the whole of the amount of $74,502.26 as ordinary and necessary expenses is the only issue in controversy before the Board for the taxable year 1933.

10. The details of the items constituting the claimed deduction of $74,502.26 for 1933 are as follows:

Amount claimed	$74,502.25
Erroneous over-statement	969.21
156 Correct amount of taxpayer's claim	$73,533.05

the details of which are as follows:

SALARIES:		
William S. Whitehead, New York Office Manager and member of the Board of Control	$12,400.00	
Gustav Zimmermann, Bookkeeper and member of the Board of Control	10,400.00	
Martin J. Dietz, in charge of real estate	9,750.00	

157

Marshal Stearns, authorized Attorney-in-Fact and Member of the Board of Control	4,000.00	
B. Besenbeck, Clerk and Stenographer	1,950.00	
D. P. Cousteau, Secretary to Higgins	9,000.00	$47,500.00

LEGAL EXPENSES:

158

Services in connection with taxpayer's leased real estate involving preparation of leases, agreements with tenants, negotiations with tenants and their attorneys actions for rent, actions to dispossess tenants, foreclosure of mortgages and general advice with respect to taxpayer's relation to his tenants and their agreements	$13,000.00	

159

Disbursements in connection with the above services for court costs, filing fees, searches, publication of process, referee's fees, filing fees	$ 692.30	
Services in connection with 1929 Federal income taxes and other advice concerning income tax matters including examination and approval of Federal and New York State income tax returns	2,500.00	
Disbursements filing petition with clerk of Board of Tax Appeals	10.00	

160 *Stipulation of Facts.*

Advice with respect to investments	1,000.00	
Services with respect to personal matters	1,000.00	
Disbursements with respect to personal matters	127.75	$18,330.05
Rent		4,500.00
Stationery		326.89
Radiograms		631.24
Postage		195.28
Petty Cash		155.00
161 Newspapers		195.94
Miscellaneous		672.02
PARIS OFFICE EXPENSES:		
Cables	$ 229.46	
Consular fees and stamps on deeds	8.37	
Stationery and stamps	124.23	362.06
Depreciation Paris Office Building 2%		600.00
Depreciation New York Office Furniture 10%		90.71
		$73,559.19
162 Less:		
Refund: Radiogram	$ 24.25	
Insurance Reduction	1.89	26.14
		$73,533.05

The entire net sum of $73,533.05 was expended by taxpayer in the year 1933 for the items detailed above except for the sums of $600 and $90.71, which are not expenditures but are the amounts of depreciation on the taxpayer's Paris office building and New York office furniture respectively.

Exhibit "A", Annexed to Stipulation of Facts.

11. The petitioner's taxable income for 1932 after giving effect to all adjustments agreed upon by the petitioner and the Commissioner, but allowing only $38,101.73 as a deduction for ordinary and necessary expenses (including $90.77 depreciation not claimed in return) is as follows:

Ordinary Income (including dividends of $74,346.37)	$278,297.70
Capital Gain	$134,731.10

12. The petitioner's taxable income for 1933 after giving effect to all adjustments agreed upon by the petitioner and the Commissioner, but allowing only $25,699.91 as a deduction for ordinary and necessary expenses is as follows:

Ordinary Income (including dividends of $52,577.38)	$290,740.12
Capital Gain or Loss	None

13. During the years 1932 and 1933 the petitioner was the owner of Federal, State and Municipal bonds, the interest on which was wholly exempt from Federal income tax. The amount of such tax-exempt interest so received by the petitioner in the years 1932 and 1933 was as follows:

1932	$643,037.68
1933	$654,791.14

Dated, New York, April 28, 1938.

O. V. W. HAWKINS,
Attorney for Petitioner.
J. P. WENCHEL
R
Chief Counsel for the Bureau
of Internal Revenue.

Exhibit "A", Annexed to Stipulation of Facts.

(Mounted on following pages)

Exhibit "A" of Stipulation of Facts

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000 AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1932

Do Not Write in These Spaces

File No. 1293

Serial No. 200692

2 New York

RECEIVED BY FEDERAL RESERVE BANK MAR 16 1933 COLLECTOR OF INTERNAL REVENUE

26.65

Tax $124720.09

Penalty

Interest

Total $

Make Check or Bank Draft payable to Collector of Internal Revenue for Your District on or Before March 15, 1933

PRINT NAME AND ADDRESS PLAINLY BELOW

Thomas Hissing

90 Union Square, East

New York, New York

Audited by [illegible] 3-9-1933

Unit No. 201-A-1

Occupation, Business, or Profession Renting Real Estate

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1931, to which Collector's office was it sent? Custom House, N. Y.
3. Is this a joint return of husband and wife? No
4. State name of husband or wife if a separate return was made and the Collector's office to which it was sent. X
5. State whether your books are kept on cash or accrual basis. Cash
6. Were you married and living with husband or wife on the last day of your taxable year? No
7. If not, were you on the last day of your taxable year supporting in your household one or more persons closely related to you? No
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support received their chief support from you during your taxable year? None
9. If your status in respect to question 5, 6, or 7 changed during the year, state date and nature of change. X

ATTACH REMITTANCE HERE

INCOME

1. Salaries, Wages, Commissions, Fees, etc. (Name, nature and address of employer)			
2. Income from Business or Profession (From Schedule A)			
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on Government bonds)		19	115 79
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source		89	089 86
5. Income from Partnerships, Syndicates, Pools, etc.			
6. Income from Fiduciaries (Name and address)	United States Trust Co. of N. Y.		
Rents and Royalties (From Schedule B)	Sheet attached	200	589 84
8. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			
9. Taxable Interest on Liberty Bonds, etc. (From Schedule E)			
10. Dividends: (a) Stock of Domestic Corporations subject to taxation under Title I of 1932 Act		76	246 37
(b) Stock of Domestic Corporations not subject to taxation under Title I of 1932 Act			
(c) Stock of Foreign Corporations			
11. Other Income. (State nature of income) (a)	Pentri Realty Co. - In settlement of Agreement to cancel lease	1	890 00
(b)			
12. Total Income in Items 1 to 11			390 394 06

DEDUCTIONS

13. Interest Paid			
14. Taxes Paid (From Schedule F)	Sheet attached	96	000 00
15. Losses by Fire, Storm, etc. (Explain in Table at foot of page)			
16. Bad Debts (From Schedule F)	Sheet attached	30	000 00
17. Contributions (From Schedule F)			000 00
18. Other Deductions Not Reported Above (From Schedule F)	Sheet attached	98	000 00
19. Total Deductions in Items 13 to 18			124 901 43
20. Net Income (Item 12 minus Item 19)			
21. Less: Net loss for 1931 (Deduct Schedule)			
22. Net Income for Tax Computation (Item 20 minus Item 21)			847 392 63

COMPUTATION OF TAX (See Instruction 23)

23. Net Income Subject to Tax (Item 22 above)		$	847 392 63	32. Normal Tax (4% of Item 23)	$	180 00
24. Less: Interest on Liberty Bonds, etc. (Item 9)	$			33. Normal Tax (8% of Item 24)		13 443 70
25. Dividends (Item 10 (c))	$2,366 37			34. Surtax on Item 23 (See Instruction 23)		94 557 31
26. Personal Exemption	1,000 00			35. Tax on Net Income (Total of Items 32 to 34)		288 001 01
27. Credit for Dependents				37. Adjustment for Capital Gain or Loss (25% of Item 36)		
28. Total of Items 24 to 27	$ 3,366 37	76 246 37		38. Total Tax (Total of or subtract between Items 35 and 37)		
29. Balance subject to Normal Tax (Item 23 minus Item 28)		771 046 26		39. Less: Income Tax Paid at Source (5% of Item 6)	$ 1882 99	1 882 99
30. Amount taxable at 4% (as per Item 29)		$ 000 00		40. Income Tax Paid to a foreign country or U. S. possession		
31. Amount taxable at 8% (Difference between Items 29 and 30)		169 046 26		41. Balance of Tax (Item 38 minus Item 39)		286 118 02
42. Amount of Capital Net Gain (Item 7 minus Item 8)						

AFFIDAVIT

I swear (or affirm) that the return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief is a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the Regulations issued thereunder.

Nr. Liggett or Travelling on Europe

(See Instruction 27)

Subscribed before me this 9 day of March 1933 Andrew J. Whittle Jr Agent

Gordon [illegible] Notary Public

Commission expires March 30, 1933

Sworn to and signed by me

U. S.

An amended return must be marked "Amended" at top of page. Such returns will be accepted only if payable at par.

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 7

1. Total receipts from business or profession (state kind of business)

Cost of Goods Sold		Other Business Deductions	
2. Labor		10. Salaries not included as "Labor" in Line 2. (Do not deduct compensation for your services)	
3. Material and supplies		11. Interest on business indebtedness to others	
4. Merchandise bought for sale		12. Taxes on business and business property	
5. Other costs (Itemize below or on separate sheet)		13. Losses (explain in table at foot of page)	
6. Plus inventory at beginning of year		14. Bad debts arising from sales or services	
7. Total (Lines 2 to 6)		15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)	
8. Less inventory at end of year		16. Rent, repairs, and other expenses (Itemize below or on separate sheet)	
9. Net Cost of Goods Sold (Line 7 minus Line 8)		17. Total (Lines 10 to 16)	
		18. Total Deductions (Line 9 plus Line 17)	
		19. Net Profit (Map 1 minus Line 18) (Enter as Item 3)	

Enter "C," or "C or M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower

Explanation of deductions claimed on Lines 8 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. Kind of Property	2. Amount Received	3. Cost or Value as of March 1, 1913, Whichever Obtained	4. Depreciation (Explain in table at foot of page)	5. Repairs	6. Other Expenses (Itemize below)	7. Net Income (Enter as Item 7)
Let's buildings and tenant lands	[illegible] 89	600,000 00	12,[illegible] 00	3,788 72	28,950 01	209,[illegible] 24

Sheet attached

Explanation of deductions claimed in Column 6

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Realized	4. Cost	5. March 1, 1913, Value if Acquired Prior to That Date	6. Cost or Improvements Subsequent to Acquisition or March 1, 1913	7. Depreciation Allowed (or Allowable) Since Acquisition or March 1, 1913	8. Net Profit or Loss (Enter as Item 9)

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 8a)

1. Kind of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. Amount Realized	5. Cost	6. March 1, 1913, Value if Acquired Prior to That Date	7. Cost or Improvements Subsequent to Acquisition or March 1, 1913	8. Depreciation Allowed (or Allowable) Since Acquisition or March 1, 1913	9. Net Gain or Loss (Enter as Item 10)

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

1. Obligations or Securities	2. Amount Owned	3. Interest Received or Accrued	4. Principal Amount Exempt From Taxation	5. Amount Owned at Time of Receipt	6. Interest on Amount at Time of Receipt (Enter as Item 6)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$11,[illegible]	$ 484,119 68	All	xxxxxx xx	xxxxxx xx
(b) Securities issued under Federal Farm Loan Act, or under such Act as amended, Treasury Bills, and Treasury Certificates of Indebtedness	900,000.	[illegible] 00	All	xxxxxx xx	xxxxxx xx
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions	4,[illegible]	140,130 00	All	xxxxxx xx	xxxxxx xx
(d) Liberty 4% and 4½% Bonds and Treasury Bonds	[illegible]	[illegible]	$5,000		
(e) Treasury Notes			All	xxxxxx xx	xxxxxx xx

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

Contributions - The Grandsons $ 500

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Property Life After Acquisition	5. Cost (Exclusive of Land)	6. March 1, 1913, Value (Exclusive of Land)	7. Depreciation Allowed (or Allowable) in Prior Years	8. Depreciation Allowed This Year
Sheet attached							

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 16

1. Kind of Property	2. Date Acquired	3. Cost or Value as of March 1, 1913, Whichever Obtained	4. Subsequent Improvements	5. Depreciation Allowed or Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss

42

172 *Exhibit "A", Annexed to Stipulation of Facts.*

EUGENE HIGGINS — U. S. INCOME TAX RETURN — 1932

Line 7—Schedule B—Rents & Royalties:

1—Loft Buildings and Vacant Lands			
2—Amount Received			$323,036.59
3—Cost or value as of March 1, 1913:			
261-7 Canal Street		$ 75,000.00	
80-86 White Street		69,000.00	
137 Fifth Avenue		80,000.00	
5 East 20th Street		7,000.00	
W. 124th-125th Streets		28,200.00	
44-46 W. 127th Street		4,500.00	
W. 130th Street & 7th Ave.		46,100.00	
Factory Lands		145,000.00	
173		$454,800.00 @ 2%	$9,096.00
Cost as of December 31, 1930:			
Broadway & 70th Street		$205,500.00 @ 2%	4,110.00
Cost as of July 1, 1932:			
554-6 W. 43rd Street		12,500.00 @ 4%	500.00
($25,000. 1932 City Assess.)			$13,706.00
		$672,800.00	
5—Repairs			$3,782.72
6—Other Expenses			
Taxes	$83,623.67		
	699.46		
		$ 84,323.13	
174 Insurance		1,826.89	
Electricity		1,182.24	
Water		338.80	
Labor	$ 4,423.15		
	1,560.00		
		5,983.15	
Coal		793.36	
Miscellany		806.24	
Fire Insurance collected & refunded		125.50	
Commissions		571.30	
			$ 95,950.61
			$113,439.33
7—Net Profit			$209,597.26

Exhibit "A", Annexed to Stipulation of Facts.

EUGENE HIGGINS — U. S. INCOME TAX RETURN — 1932

Line 14—Taxes Paid—Schedule F:

French Income Taxes: Fr 363,745.00 @ .03934 (average)		$14,309.73
Union Club	$20.00	
Metropolitan Club	22.50	
N. Y. Yacht Club	15.00	
Jekyll Island Club	70.00	
Coaching Club	2.50	
N. Y. Athletic Club	15.00	
St. Anthony Club	5.00	
Whippany River Club	15.00	
Assess.—Union Club	4.00	
Riding Club	22.50	
Racquet & Tennis Club	22.50	
Tuxedo Club	20.00	
University Club	15.00	
The Brook	27.50	
Fencers Club	7.50	
		$284.00
N. Y. State Tax	$5,692.67	
	2,846.34	
	2,846.34	
		$11,385.35
Taxes on checks	$ 4.08	
Safe Deposit Box	19.00	
Radiograms	.90	
Telephones	x	
	$23.98	$23.98
		$26,003.06

Line 16—Bad Debts:

Ferdinand Cohn 5½% Mtge Deficiency Judgment		$30,000.00
Original Amount	$50,000.00	
Bid at Auction	$20,000.00	

Line 17—Contributions:

The Crusaders	$250.00	
	250.00	
		$500.00

178 *Exhibit "B", Annexed to Stipulation of Facts.*

EUGENE HIGGINS U. S. INCOME TAX RETURN 1932

Line 18—Other Deductions—Schedule F

Salaries	$47,500.00	
Rent	4,624.98	
Stationery	287.69	
Radiograms	476.05	
Postage	150.60	
Petty Cash	70.00	
Newspapers	189.57	
Miscellaneous	853.96	
Lawyers Fees	20,414.25	
	$74,567.10	
179 Paris Office Expenses	1,331.27	
	$75,898.37	$75,898.37
Depreciation Paris Office Building 5%		600.00
		$76,498.37

Exhibit "B", Annexed to Stipulation of Facts.

(Mounted on following pages)

180

Blank Page

Exhibit B of Stipulation of Facts

INDIVIDUAL INCOME TAX RETURN

For Calendar Year 1933

Do Not Write in These Spaces

File No. 1 1/4

Serial Number 200653

DEPOSITED IN FEDERAL RESERVE BANK MAR 14 1934

Form 1040

1933 - 2484265

Penalty - -

Interest - -

Total $

Made Out or Rec. 6-29-35

Audited by ARB 6-16-36

Init. No. AR-A-2

(Name and address of filing party)

First Payment

Yes

Home

No

Cash

INCOME

1. Salaries, Wages, Commissions, Fees, etc.			
2. Income (or Loss) from Business or Profession. (From Schedule A)			
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)	11	068	43
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source	107	500	00
5. (Income (or Loss) from Partnerships, Syndicates, Pools, etc.			
6. Income from Fiduciaries			
7. Rents and Royalties. (From Schedule B) Sheet attached	622	81	
8. (a) Profit from Sale of Stocks and Bonds held two years or less. (From Schedule C (a))			
(b) Profit or Loss from Sale of Other Assets held two years or less. (From Schedule C (b))			
(c) Profit or Loss from Sale of Capital Assets (If not reported as Item 20). (From Schedule C (c))			
9. Taxable Interest on Liberty Bonds, etc. (From Schedule D)			
10. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of 1932 Act			
(b) Domestic Corporations not subject to taxation under Title I of 1932 Act Sheet attached	58	577	38
(c) Foreign Corporations			
11. Other Income. (State nature. If on separate schedule, if necessary) Judgment collected	300	42	
12. Total Income in Items 1 to 11			344 622 04

DEDUCTIONS

13. Interest Paid			
14. Taxes Paid (Explain on Schedule E)	21	126	15
15. Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)			
16. Bad Debts (Explain on Schedule E)			
17. Contributions (Explain on Schedule E) Capt. Drayton Depot Fund		250	00
18. Other Deductions Authorized by Law (Explain on Schedule E) Sheet attached	74	502	26
19. Total Deductions in Items 13 to 18			96 878 41
20. Net Income (Item 12 minus Item 19)			248 746 63

COMPUTATION OF TAX (See Instruction 23)

21. Net Income Subject to Tax (Item 20 above)		$ 248 746 63	31. Normal Tax (4% of Item 29)		$ 7[illegible] 00
22. Less: Interest on Liberty Bonds, etc. (Item 9)	$		32. Normal Tax (4% of Item 30)	15	749 84
23. Dividends (Item 10 (b))	58,577 38		33. Surtax on Item 30 (see instruction 24)	99	033 38
24. Personal Exemption	1,000 00		34. Tax on Net Income (total of Items 32 to 33)	$ 114	783 22
25. Credit for Dependents			35. Adjustment for Capital Gain or Loss (4% of Item 20)		
26. Total of Items 22 to 25	$ 59,577 38	59 577 38	36. Total Tax (total of or difference between Items 34 and 35)	$ 114	783 22
27. Balance subject to Normal Tax (Item 21 minus Item 26)	$	189 169 25	37. Less: Income Tax Paid at Source (4% of Item 9)	$2,114	140 00
28. Amount taxable at 4% (not over $4,000)	$	4 000 00	38. Less: Income Tax Paid to a foreign country or U. S. possession	$	
29. Amount taxable at 8% (Item 27 minus 28)	$	185 169 25	39. Balance of Tax (Item 36 minus Items 37 and 38)		$149 643 22
30. Amount of Capital Net Gain or Loss (if not reported on Item 20) (From Schedule C (c))	$			1/4	27 160 72

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief is a true and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the National Industrial Recovery Act and the Regulations issued thereunder.

(See Instruction 27) Mr E Higgins on my behalf (If return is made by agent, power of attorney must be mailed on this form)

Sworn to and subscribed before me this [illegible] day of March 1934

E. W. MILLER NOTARY PUBLIC, Kings Co. Clk's No. 8-34 Reg. No. 8-M-1934 Comm. Exp. March 30, 1935

NOTARIAL SEAL

(Signature of officer administering oath) (County) (State)

W. S. Whitehead Agent

(Signature of taxpayer or agent)

56 Union Sq E New York

(Address)

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par

SCHEDULE A—GROSS INCOME (OR LOSS) FROM BUSINESS OR PROFESSION (See Instruction 7)

1. Total receipts from business or profession (gross total of business)
   Cost or Gross Sold
2. Labor
3. Material and supplies
4. Merchandise bought for sale
5. Other costs (Itemize below or on separate sheet)
6. Plus inventory at beginning of year
7. Total (Lines 2 to 6)
8. Less inventory at end of year
9. Net Cost or Gross Sold (Line 7 minus Line 8)

Enter "C", or "C or M", on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Other Business Deductions

10. Salaries not included as "Labor" in Line 2 (do not deduct compensation for your services)
11. Interest on business indebtedness to others
12. Taxes on business and business property
13. Losses (explain in table at foot of page)
14. Bad debts arising from sales or services
15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)
16. Rent, repairs, and other expenses (Itemize below or on separate sheet)
17. Total (Lines 10 to 16)
18. Total Deductions (Line 9 plus Line 17)
19. Net Profit (or Loss) (Line 1 minus Line 18) Enter as Item 2)

Explanation of deductions claimed on Lines 9 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. Kind of Property	2. Amount Received	3. Cost or Value as of March 1, 1913, if Acquired Otherwise	4. Depreciation (Explain in table at foot of page)	5. Repairs	6. Other Expenses (Itemize below)	7. Net Profit (Enter as Item 2)
Loft Buildings and						
Tenant Lands	371,857 [illegible]	925,300 [illegible]	14,256 00	2,224 [illegible]	[illegible]	73,122 [illegible]

Explanation of deductions claimed in Column 6

SCHEDULE C—PROFIT OR LOSS FROM SALE OF STOCKS, BONDS, REAL ESTATE, ETC. (See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Amount Realized	5. Cost	6. March 1, 1913, Value if Acquired Prior to That Date	6-7. Cost or Improvements Subsequent to Acquisition or March 1, 1913	8. Depreciation Allowed (or Allowable) Since Acquisition or March 1, 1913	9. Net Profit or Loss
(a) Stocks and Bonds* Held Two Years or Less:	Mo. Day Year	Mo. Day Year						
						XXXXXX	XXXXXX	
Total (a) (Transfer net profit to Item 8 (a))	XXXXX	XXXXX				XXXXXX	XXXXXX	
(b) Other Assets Held Two Years or Less:								
Total (b) (Transfer net profit or loss to Item 8 (b))	XXXXX	XXXXX						
(c) Capital Assets:								
Total (c) (Transfer net gain or loss to Item 8 (c) or 9)	XXXXX	XXXXX						

* As defined in Section 38 (c), 1932 Act.
** Date property was acquired

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

1. Description of Securities	2. Amount Owned	3. Interest Received or Accrued	4. Principal Amount Exempt from Taxation	5. Amount Owned in Excess of Exemption	6. Interest on Amount in Excess of Exemption (Enter as Item 9)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$11,121,000.	$454,117 66	All	XXXXXX	XXXXXX
(b) Securities issued under Federal Farm Loan Act, or under such Act re-exempted, and obligations of United States possessions	540,000.	22,750 00	All	XXXXXX	XXXXXX
(c) Liberty Bonds and other obligations of United States issued on or before September 1, 1917	4,587,000.	177,923 [illegible]	All	XXXXXX	XXXXXX
(d) Liberty 4½ and 4¼% Bonds and Treasury Bonds			$5,000		
(e) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	XXXXXX	XXXXXX

SCHEDULE B—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquisition	5. Cost (Exclusive of Land)	6. March 1, 1913, Value if Acquired Prior to That Date (Exclusive of Land)	7. Depreciation Allowed (or Allowable) Since March 1, 1913	8. Depreciation Allowable This Year
Stock in Trade							

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 16

1. Kind of Property	2. Date Acquired	3. Cost or Value as of March 1, 1913, if Acquired Otherwise	4. Subsequent Improvements	5. Depreciation Allowed (or Allowable)	6. [illegible]	7. [illegible]

Blank Page

Exhibit "B", Annexed to Stipulation of Facts.

187

EUGENE HIGGINS U. S. INCOME TAX RETURN 1933

Line 3—Interest on Bank Deposits and Bonds:

National City Bank	$ 98.63	
United States Trust Co. of N. Y.	3,404.80	
		$ 3,503.43
Interest on Bonds:		
Chamber of Commerce B/F	5.00	
Wm. C. Dewey B/M	1,375.00	
Newport News Light & Water Co.	100.00	
Chicago, Burlington	4,000.00	
M. R. Stang B/M	2,025.00	
		7,505.00
Interest on 6 months interest due July 1, 1933, paid December 30, 1933, Chicago, Rock Island & Pacific Railroad Company	60.00	60.00
		$11,068.43

188

Line 4—Interest on Tax free Bonds:

Central R. R. of N. J.	5,000.00	
Chic. R. I. & Pac. R. R.	6,000.00	
Southern Pacific Co.	700.00	
Atchison, Topeka & Santa Fe	4,000.00	
N. Y. Ontario & Western	2,000.00	
United N. J. R. R. & Canal	3,500	
Atlantic Coast Line	2,000.00	
Cleveland & Pitts. R. R.	1,750.00	
N. Y. Central R. R.	5,250.00	
Norfolk & Western R. R.	6,000.00	
Chic. North Western R. R.	6,000.00	
Illinois Central R. R.	4,000.00	
Southern Pacific R. R. Co.	4,000.00	
Louisville & Nashville	2,000.00	
Chic. St. Louis & New Orleans	5,000.00	
Glen Alden Coal Company	49,800.00	
		$107,000.00

189

EUGENE HIGGINS U. S. INCOME TAX RETURN 1933

Line 7—Schedule B—Rents & Royalties:

1—Loft Buildings, Tenements and Vacant Lands	
2—Amount Received	$271,247.04

Exhibit "B", Annexed to Stipulation of Facts.

190

3—Cost or value as of March 1, 1913:		
261-7 Canal Street	$ 75,000.00	
80-86 White Street	69,000.00	
137 Fifth Avenue	80,000.00	
5 East 20th Street	7,000.00	
W. 124th-125th Streets	28,200.00	
44-46 W. 127th Street	4,500.00	
W. 130th Street & 7th Ave.	46,100.00	
Factory Lands	145,000.00	
	$454,800.00 @ 2%	$ 9,096.00
Cost as of December 31, 1930:		
Broadway & 70th Street	$205,500.00 @ 2%	4,110.00
Cost as of July 1, 1932:		
191 554-6 W. 43rd Street	$ 25,000.00 @ 4%	1,000.00
		$14,206.00
5—Repairs		2,224.20
6—Other Expenses		
Taxes	$ 64,391.98	
Insurance	1,364.96	
Electricity	1,199.77	
Water	296.10	
Labor	5,953.09	
Coal	1,122.41	
Miscellany	713.62	
Fire Insurance collected and refunded to tenants	4,070.00	
Commissions	2,082.10	81,194.03
192		$ 97,624.23
7—Net Income		$173,622.81

EUGENE HIGGINS U. S. INCOME TAX RETURN 1933

Line 6 and 9—Taxable Interest Liberty Bonds—Schedule D

a)—State of New York	$ 62,749.34	$ 1,721,000.00
City of New York	102,300.56	2,381,000.00
State of New Jersey	85,215.00	2,000,000.00
Newark, N. J.	47,295.00	1,088,000.00
Philadelphia, Pa.	85,000.00	2,000,000.00
Commonwealth of Massachusetts	11,726.67	391,000.00
City of Boston	18,641.11	709,000.00
State of Connecticut	15,000.00	300,000.00
State of Michigan	26,190.00	601,000.00
	$454,117.68	$11,191,000.00

Exhibit "B", Annexed to Stipulation of Facts.

b)—		$ 2,500.00	$ 50,000.00
		6,750.00	150,000.00
		13,500.00	300,000.00
		$ 22,750.00	$ 500,000.00
c)—3½% 1st L. L.		$177,923.46	$ 5,587,000.00
c)—Panama Canal		3,000.00	100,000.00

Line 10—Dividends:

Morris & Essex Railroad	$ 9,009.38	
N. Y. Lackawanna & Western	14,725.00	
Pittsburgh Ft. Wayne & Chicago	3,500.00	
Lackawanna R. R. of N. J.	10,268.00	
American Tel. & Tel. Co.	15,075.00	
		$ 52,577.38

Line 11—Other Income:

Judgment collected No. 137 Fifth Avenue	$356.42

EUGENE HIGGINS U. S. INCOME TAX RETURN 1933

Line 14—Taxes Paid—Schedule F:

French Income Taxes:			$14,309.73
Union Club	$ 20.00		
Metropolitan Club	22.50		
New York Yacht Club	15.00		
Jekyll Island Club	70.00		
Riding Club	32.50		
Coaching Club	2.50		
New York Athletic Club	15.00		
St. Anthony Club	5.00	(Federal Tax Club Dues.)	
Racquet & Tennis Club	22.50		
Tuxedo Club	20.00		
University Club	15.00		
Fencers Club	7.50		
The Brook	27.50		
			275.00
New York State Income Tax			6,010.93
Federal check tax	$ 7.74		
Safe Deposit Tax	19.00		
Radiograms	3.10		
			29.84

Income Tax withheld by Companies on Dividends:

New York Lackawanna R. R.	$184.06

196 *Exhibit "B", Annexed to Stipulation of Facts.*

Lackawanna R. R. of N. J.	128.35	
American Tel. & Tel. Co.	188.44	500.85
		$21,126.35

EUGENE HIGGINS U. S. INCOME TAX RETURN 1933

Line 18—Other Deductions—Schedule F

Salaries	$47,500.00	
Rent	4,500.00	
Stationery	326.89	
Radiograms	631.24	
197 Postage	195.28	
Petty Cash	155.00	
Newspapers	195.94	
Miscellaneous	672.02	
Lawyers Fees	18,330.05	
		$72,506.42
Paris Office Expenses:		
Lawyers Fees	$ 1,058.36	
Cablegrams	213.76	
Consular Fees & Stamps	12.08	
Stationery & Postage	47.07	1,331.27
		$73,837.69
Less:		
Refund: Radiogram	$ 24.25	
Insurance Reduction	1.89	26.14
198		
		$73,811.55
Depreciation:		
Paris Office Building 2%	$ 600.00	
New York Office Furniture 10%	90.71	690.71
		$74,502.26

NOTICE TO INDIVIDUAL TAXPAYERS

This form should be executed and filed as a part of Individual Income Tax Form 1040 for the calendar year 1933. If you merely received *advice* from some person or persons employed to assist in the preparation of the return, the name and address of your advisor, together with a

statement showing the extent to which such assistance or advice was received, is sufficient. If your return was *actually prepared* by any such person or persons, this form must be signed and sworn to by such person or persons.

Did you employ anyone especially to prepare or advise in the preparation of your income return for the calendar year 1933? (Answer "yes" or "no") Yes. If so, give name and address of such person or persons and state to what extent such assistance or advice was received:

This return was prepared by employees in taxpayer's office and was examined and approved by Duer, Strong & Whitehead, taxpayer's attorneys.

I, acting as advisor for the hereto subscribed taxpayer,
(Attorney or advisor)
affirm that I examined the return, that the information set out in the return and accompanying schedules, if any, correctly and truly represents the information furnished or discovered by me during the course of preparation of the return; and that such information is true to the best of my information and belief. That I am a member of the firm of Duer, Strong & Whitehead, and acted for taxpayer in this connection.

.....
(Attorney or Advisor)

O. V. W. HAWKINS.
(Address)

Sworn to and subscribed before me this 7th day of March, 1934.

GERARD T. SHEVLIN ....
(Signature of officer administering oath) (Title)

NOTARIAL SEAL

202

Findings of Facts and Opinion.

UNITED STATES BOARD OF TAX APPEALS.

EUGENE HIGGINS, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket Nos. 80052, 85961. Promulgated May 24, 1939.

203 Petitioner owned real estate of a value of approximately $10,000,000, nontaxable securities of a value of approximately $16,000,000, and taxable securities of a value of approximately $10,000,000. He resided during the taxable years and for several years before and after, in France; had no business in France and lived there by choice and for his health; maintained an office and several employees in New York, with duplicates of some of its records in an office adjacent to his residence in Paris, France, in which office he had one employee; was in almost daily communication with his New York office; and passed personally upon most important matters, both as to real estate leases and matters, which re-
204 quired about two-thirds of the attention of the New York office, and matters as to securities. His securities were purchased for him by a trust company and delivered to his New York office. He preferred long-term bonds rather than short-term bonds. He did not participate in the management of the companies in which he had investments, nor vote in corporate meetings, and has not been in the United States since 1921. He was not a dealer in securities. Purchases of securities in the taxable years were small compared with the petitioner's total investments therein. *Held*, that under

205

section 23 (a), Revenue Act of 1932, he is not entitled to deductions as expense of trade or business so far as incurred in the ownership of securities, but is entitled to deduction of expenses so far as incurred in his real estate business, both in New York and in his Paris office, which are held to be business expenses.

Orwill V. W. Hawkins, Esq., and *Harry H. Wiggins, Esq.*, for the petitioner.

C. P. Reilly, Esq., for the respondent.

206

The two proceedings above named were consolidated at the time of hearing. There are involved the income tax returns of Eugene Higgins for the years 1932 and 1933. The Commissioner determined a deficiency of $126,730.08 for the year 1932, and a deficiency of $24,542.65 for the year 1933. The only issue left for determination is the propriety of certain deductions claimed as ordinary and necessary expenses paid or incurred in carrying on trade or business, under section 23 (a) of the Revenue Act of 1932. For the year 1932 petitioner claimed a deduction of $76,498.37 of which respondent, contending that investment in securities was not trade or business, in the notice of deficiency disallowed $38,487.41; for the year 1933 the petitioner claimed a deduction of $74,502.26 of which respondent in the notice of deficiency disallowed $48,802.35. A stipulation was filed as to some of the facts involved, which stipulation we adopt (setting forth hereinafter facts stipulated only as necessary to discussion); and in addition thereto, we make the following findings of fact.

207

FINDINGS OF FACT.

The petitioner, a citizen of the United States, during the taxable years maintained an office in New York and an

208 office in Paris, France. William S. Whitehead was office manager of the New York office and D. P. Cousteau constituted the personnel of the Paris office. William S. Whitehead had as assistants Martin J. Dietz, Gustav Zimmerman as accountant, and one Bessenbeck as stenographer and clerk. The office, which occupied rented space at No. 50 Union Square East, New York City, consisted of four rooms. The office in Paris consisted of a small two-story building, the second floor of which was entirely occupied as an office. It consisted of several rooms, the building measuring about 50 by 20 feet. It was not connected
209 with petitioner's residence, though upon the same grounds. It contained filing cabinets, desks, typewriters, and a sort of library.

The petitioner owned approximately 26 pieces of real estate in the Borough of Manhattan, County of New York, of which four were vacant land; and three pieces—two one-acre plots in Pelham Manor, New York, and another 1¾ acres in the city of Morristown, New Jersey, said three plots being undeveloped and vacant. The value of this real estate was approximately $10,000,000. In addition thereto the petitioner owned securities of a value of approximately $25,000,000 or $26,000,000.

210 Petitioner maintained in his New York office an organization known as a board of control, consisting of three members, which board in the taxable years consisted of William S. Whitehead, Gustav Zimmerman, and Marshall Stearns, who was an attorney and petitioner's personal counsel. The duties and functions of this board were to pass upon all applications for leases upon real estate and to pass upon all payments made by the office in New York, with the exception of payments for Federal and New York income taxes and New York City real estate taxes and attorneys' fees, which items the petitioner paid by check or by

211

authorizing a New York bank to do so upon advice from his New York office. The board of control met on Tuesday and Friday of each week. At such meetings the discussions were limited to matters pertaining to real estate. Minutes were kept of each meeting, which were signed by the members and sent to the petitioner, and a copy kept in the New York office. There were invariably recorded in the minutes of the board of control any propositions for new tenants and notations of the expiration of leases three months before expiration. The routine has been the same, under the petitioner's orders, since about 1902. The board of control had nothing to do with the petitioner's securities, but dealt with petitioner's real properties, most of which are leased for terms of various lengths. These leases were arranged by the board of control, which investigated the financial stability of the prospective tenant and all other details and submitted the proposition to the petitioner, who either rejected or accepted. If the offer was accepted, petitioner's attorneys prepared a lease, which was printed, signed by the prospective tenant, and, after being approved by the attorneys, was sent to the petitioner in Paris for signature. The petitioner would not sign any document unless the approval thereof by his attorneys was endorsed upon the document. No one had authority to sign any lease for the petitioner, and no one has ever done so in 30 years. No lease was final until returned from the petitioner with his signature thereon, although the prospective tenant was required to sign first, and tentative payment of rent was required. Any modification of leases went through the board of control to the petitioner. This has been the procedure under instructions of the petitioner given many years ago. Petitioner seldom accepted the board's recommendation in total, and usually wished something changed. Upon receipt of a letter he would usually either cable or radio, being

212

213

214 a prolific user of the cable and radio. He was in touch with his New York office by letter or cable almost daily.

Petitioner's policy for the last 10 or 15 years has been never to sell real property. The last sale was in 1927. He had his finger on every piece of business and his instructions were followed. The principal activity of petitioner's New York office was the management of his real estate. A weekly statement of receipts and disbursements was sent to petitioner every Friday and an annual report of receipts and disbursements was also sent to him. The annual report showed the percentage earned by petitioner's invest-
215 ments in real estate and in stocks and bonds, as against each individual parcel of real estate and each item of securities. The annual report took about two weeks to prepare and a week to typewrite.

The system of keeping petitioner's securities was that the New York office had two boxes, to one of which the petitioner only had access, and to the other of which William S. Whitehead and Marshall Stearns had access. In the box to which the petitioner only had access were kept mostly tax-exempt securities and railroad bonds, in about equal proportions.

Petitioner's securities were purchased for him by the
216 United States Trust Co. In his directions to that company as to investments, the petitioner often stressed that investments be entirely safe. He often authorized the United States Trust Co. of New York to purchase registered bonds at prices within its discretion, within limits. In the year 1932 petitioner held nontaxable securities in the amount of $16,453,000, and in 1933 held nontaxable securities to the extent of $17,278,000. The nontaxable securities were fully registered as to the principal and interest, and no coupons were attached thereto. The income was paid on these registered bonds every six months by check. When these were

217

received the envelopes were opened and deposit made, the big deposit days being four times a year. A record of the deposits was kept in the cash book and in the interest registry. After the deposit was made, that was the end of a matter, so far as the New York office was concerned. No one in that office had anything to do with the purchase of nontaxable securities, except to receive them from the United States Trust Co., to check them off with the Trust Co. list, and to place them in the safe deposit vault, which was done by Whitehead and Stearns. No one in the New York office made any recommendations or carried out any recommendations as to the purchase of nontaxable securities. In 1932 the only securities purchased by the petitioner were $675,000. These comprised bonds issued by the city of Boston in the sum of $361,000, the State of Massachusetts in the sum of $100.000, and the State of New York in the amount of $214,000. In 1933 the only securities purchased were United States of America bonds in the total sum of $1,052,000.

218

Petitioner's income all came to his New York office as rents, checks for interest coupons, checks for dividends, and other items of that kind, and was deposited to his account as it came in. The checks for interest and dividends which came to petitioner's office were endorsed by rubber stamp and deposited. Petitioner maintained two accounts in New York banks, the National City Bank and the United States Trust Co., in which all income of petitioner of every name and nature was deposited, and from which no one ever held any authority to withdraw funds except the petitioner himself, whose signature was necessary on all checks on those two bank accounts. He maintained for office expenses another bank account in the Chase National Bank, into which were transferred the proceeds of one check at a time from him, the check being sent by him marked for deposit

219

220 to his credit, upon application of some one in his New York office. This was used as the office needed money for office expenses, salaries, repairs, and the like. Upon that account William S. Whitehead and Marshall Stearns wrote checks, but from that account no securities were bought. Petitioner did not borrow any money to invest in non-taxable securities.

Of the deductions claimed in the 1932 income tax return as to the New York office, the item of stationery, $287.69, represented writing paper, ink, and general run of stationery for the office use; radiograms, $476.76, were sent
221 in connection with petitioner's office; postage, $150.60, was used in connection with petitioner's office; petty cash, $70, was for car fares, office help, and little incidentals, used in connection with petitioner's office; newspapers, $189.57, were real estate bulletins, the Financial Chronicle and the Commercial Bulletin, and some daily papers, part of which were kept in the New York office and part of which were sent to the petitioner, but all used in connection with petitioner's business. Some of the periodicals relate entirely to real estate and others to stocks and bonds. The deduction did not include such personal items as the Chess Bulletin. Careful effort was made to keep petitioner's per-
222 sonal matters separate from business charges. The item of "Miscellaneous", $853.96, represented in the main payment of an audit company, $360, Christmas gifts for the help of the building, and items of that general nature. The audit was of the business books. For the year 1933 similar items of substantially the same nature as those claimed as deductions for 1932 were claimed by the petitioner.

The petitioner has not been in the United States since 1921, having been in Europe, particularly in France, during that time. He had no business whatever in France or

223

Europe, and in the taxable years reported no income from foreign corporations. He lived there as a matter of choice because he liked to live there for his own pleasure and for his health. He has a seagoing yacht. In investing, he chose registered bonds, rather than coupon bonds, because he wanted to be in full control of his money, and to handle it all himself, did not want any one clipping coupons on his bonds, and preferred to have the interest come in the form of checks. His office in New York kept records both of his real estate enterprises and of his stocks and bonds. Petitioner preferred to invest in long-term bonds rather than in short-term bonds. Books were not kept separately for the real estate enterprises as distinguished from the investments in securities, the matters all being in one set of books with, however, separate accounts. Most of the work of the New York office was caused by the real estate investments. The rents took up more time than receipt of tax-exempt interest, because the rents came in piecemeal, at various times in each month, and were added to the weekly statement sent to the petitioner. A record was kept of the various securities to see whether interest and dividends were received. The weekly report to the petitioner included information with respect not only to the real estate, but also with respect to the securities. Tax-exempt securities required a considerable item on the reports made in the first quarterly months of the year, but the other securities were more of an item on the weekly report. The annual report, consisting of 16 pages, gave the individual return from each individual investment. It took up three solid pages for real estate, and the rest represented matters concerning petitioner's securities.

224

225

Most of Gustav Zimmerman's time was taken up with real estate matters, and sitting on the board of control. He kept the books, including accounts of the various securities,

226 interest and dividends therefrom, rentals received, etc., although he generally prepared petitioner's Federal and state income tax returns, with the help of the attorneys. Approximately two-thirds of the time of Gustav Zimmerman and William S. Whitehead in 1932 and 1933 was taken up with real estate matters, and the other one-third with all other interest and dividends. Martin J. Dietz was in charge of real estate during 1932 and 1933, and had nothing to do with any other business. Bessenbeck was combined office boy, stenographer and general clerk and assistant. His efforts involved both real estate and securities matters. In Paris,
227 D. P. Cousteau's duties were to check off the accounts the New York office sent him in the weekly statements, and to act as stenographer to the petitioner. He attended to all of petitioner's correspondence in Paris upon receipt of accounts and letters from the New York office, replied, and took the petitioner's dictation, and took care of posting of mail and sending of cablegrams and radiograms to the New York office. The letters were in connection with investments in stocks and bonds and securities as well as real estate. He kept "close tabs" on the New York office. The petitioner did the same. Petitioner's affairs have been managed in the same manner since 1889.

228 Duplicates of the records kept in the New York office were during the taxable years kept in France, consisting of cash book, registry of dividends and interest, and account books as to real estate. On two different occasions a duplication of the books of the New York office were sent to the petitioner in Paris. In the taxable years the extent of the petitioner's activities in the corporate enterprises in which his money was invested was to receive reports and keep track of the dividends and interest he received as an investor in the stock. In the early days he was on the board of managers of the Delaware, Lackawanna & Western Rail-

road Co., but not during the taxable years. The stock in the various corporations owned by petitioner was solely in his name, and he did not appoint anyone to vote for him. In his 1932 income tax return petitioner designated his business occupation or profession as that of renting real estate; in 1933 he made no designation. As to both years, no income was reported under the caption "Income from business or profession." With the exception of one small item in each year ($356.42 for 1932; $1,250 for 1933), all income was reported under the four heads; interest on bank deposits, notes, etc.; interest on tax-free covenant bonds; rents and royalties; and dividends from domestic corporations. The total gross income reported for 1932 was $380,394.06, net income $247,392.63; for 1933, total income, $344,625.04, net come, $248,746.63. Income reported from rents and royalties for 1932 was $209597.26; for 1933, $173,622.81.

If it were not for petitioner's securities and other investments, the office could have been run with decidedy less help. A bookkeeper and stenographer might have been dispensed with. A real estate man and a bookkeeper were necessary. On account of the petitioner's investments, a bookkeeper and an office boy at least were needed. Gustav Zimmerman and Bessenbeck might, under such circumstances, be dispensed with.

In 1931 petitioner settled with the Commissioner of Internal Revenue a matter pending before the Board of Tax Appeals in which he was represented by attorneys. The case involved income tax for the year 1921, in which petitioner sold bonds in the amount of $4,576,500, and a deficiency of $80,887.52, arising from holdings of securities. In 1932 petitioner paid for such services $3,000 and $189.02 for incidental expenses connected therewith. The Commissioner also had a claim for income tax against the petitioner for 1929, involving a deficiency of $18,391.14, arising from

232 condemnation of real estate, and in 1932 petition was filed with the Board of Tax Appeals for review of the deficiency determined. Petitioner paid for these services in 1933, in the sum of $2,500. Of the $2,500 item, $2,000 fairly represented the 1929 income tax controversy before the Board of Tax Appeals.

Depreciation was sustained on the Paris office in the amount of $600 for each of the taxable years.

OPINION.

233 DISNEY: Petitioner contends that the burden of proof is upon the respondent upon the ground that respondent, by calculating allowable deductions upon the proporation of tax-exempt income to gross income, and by reference to tax-exempt income as not giving rise to deductions, had taken the position of allowing the entire deductions as being paid or incurred in trade or business, but of then disallowing them in part upon the theory, not now pressed, that tax-exempt income may not give rise to business deductions. In the deficiency letter for 1933 (though not in that for 1932), the Commissioner stated that petitioner was not engaged in trade or business within the meaning of section 23 (a) of the
234 act (quoting the section); petitioner affirmatively alleged error of the respondent, "particularly by disallowing deductions * * * to the extent of * * * a part of the expenses paid by petitioner for legal and office expenses * * * in the conduct of his business." Respondent does not seek increased deficiency, but, on the contrary, seeks to disallow as deductions less than the amount disallowed in deficiency notices, and did not ask affirmative relief. The stipulations of fact, contrary to petitioner's argument on brief, state that respondent disallowed certain amounts of petitioner's claim for deduction of ordinary and necessary expense. Under

these circumstances, it may well be doubted whether the burden of proof shifted to respondent, but we find it unnecessary to decide that question. We assume, without deciding, that the burden of proof was upon respondent, and base our opinion upon the facts adduced and the law applicable.

Respondent admits that the real estate activities of petitioner from his New York office constituted trade or business. The question before us, whether activity in investments constitutes trade or business within section 23 (a) of the Revenue Act of 1932, has been variously answered under various circumstances, and of course is to be viewed in the light of the facts involved in each proceeding. Both petitioner and respondent cite cases which tend to support their respective contentions. We shall not attempt to review in detail all of the various situations involved in those cases. Petitioner most particularly, perhaps, points out our decision in *Caroline T. Kissel,* 15 B. T. A. 1270; *Cornelia W. Roebling,* 37 B. T. A. 82; and *Kales* v. *Commissioner,* 101 Fed. (2d) 35, reversing *Alice G. Kales,* 34 B. T. A. 1046. Reliance is placed also upon *Austin D. Barney et al., Executors,* 36 B. T. A. 446. Respondent, on the other hand, relies heavily upon *Kane* v. *Commissioner,* 100 Fed. (2d) 382, affirming *Helen W. Heilbroner,* 34 B. T. A. 1200; *Foss* v. *Commissioner* 75 Fed. (2d) 326, and other cases.

In *Washburn* v. *Commissioner,* 51 Fed. (2d) 949, it was said:

> * * * A party may have investments in corporate stock, have no particular occupation, and live on the return of his investments. That would not constitute business under the statute in question. He may, however, take such an active part in the management of the enterprise in which he has investments as to amount to the carrying on of a business. * * *

238

In *Foss* v. *Commissioner, supra,* a rule is laid down as follows:

> * * * A person of property, who devotes his time to the active management of it and also to active participation in the management of the companies in which his property is invested, and who maintains an office for that purpose where he spends a substantial part of his time, is carrying on business within the meaning of this statute. * * * The line comes between those who take the position of passive investors, doing only what is
239 necessary from an investment point of view, and those who associate themselves actively in the enterprises in which they are financially interested and devote a substantial part of their time to that work as a matter of business. The maintenance of an office for this purpose, though not conclusive, is significant. * * *

The mere fact that investments produce income is not decisive. *Monell* v. *Helvering,* 70 Fed (2d) 631, states:

> * * * If we were to agree with the argument of the petitioner's counsel that the real test of deductibility
240 is whether the expense was an ordinary and necessary one in obtaining income, we would take what might be supported as a fair one. If Congress had intended to allow deductions on that basis, however, it would have been too simple and easy to have said so to make it reasonable to believe that such was intended by the language which plainly limited expenses deductible to those incurred ordinarily and necessarily in carrying on a trade or business. * * *

We must therefore decide petitioner's position as to whether he was "doing only what is necessary from an in-

241

vestment point of view", or whether, on the contrary, he was among "those who associate themselves actively in the enterprises in which they are financially interested and devote a substantial part of their time to that work as a matter of business." Weighing the petitioner in these balances, we find that the petitioner has not been in the United States since 1921, and a fair interpretation of the following testimony seems to remove petitioner from the company of those who participate actively in the management or control of investments. We quote:

242. Q. Does Mr. Higgins devote any time to the business of the corporations in which he owns stocks or is he merely an investor in those stocks?

A. In the early days he was on the Board of Managers of the Delaware, Lackawanna and Western Railroad Company.

Q. I am speaking now of the years 1932 and 1933.

A. He was not in the country in 1931, 1932 or 1933. The last time he was here was 1921.

Q. Then would your answer be that he did not devote any time to the business of the corporations in which he owned stock?

243 A. May I ask a question? Do you mean to imply he didn't watch any financial statements of the company?

Q. No, in the affairs of the corporation itself—

A. That he was right present?

Q. Taking an active part in the affairs or was he merely an investor in the stock?

A. Oh, he was an investor in the stock then.

Q. In other words, would you say that the extent of Mr. Higgins' activities in the corporate enterprises in which his money is invested is to receive reports and keep track of the dividends and interest he receives?

A. Yes.

244

In *Bedell* v. *Commissioner*, 30 Fed. (2d) 622, it is said: "Most men who have capital change their investments, and may speculate all the time; we should hardly call this a business, though the line is undoubtedly hard to draw." Therein, as herein, the fact of real estate business was relied upon as proof that there was a single business, including real estate, negotiable securities, etc., and that therefore the party was in business as to the securities. That interpretation of the statute was rejected. It is true that the statute there considered was section 204 (a) of the Revenue Act of 1918 as to "business regularly carried on", yet the emphasis
245 is placed by the court not upon the lack of regularity, but upon the lack of essential business nature of the transactions.

In *Kane* v. *Commissioner*, *supra*, we were affirmed in holding that a taxpayer deriving income from investments and securities is not entitled to deductions as business expenses, office rent, services of a bookkeeper, and fees as custodian and for collection of income, charged by a trust company. The same elements, in effect, enter into this proceeding, for the petitioner here desires to deduct rent and salaries of bookkeeper and other employees, and purchased his securities through a trust company. The court was of
246 the opinion that in order to secure business deductions it would not be enough "to secure or attempt to secure income or capital stability by conversions of bonds into stock or vice versa, or by otherwise safeguarding the taxpayer's investments", and, after referring to *Foss* v. *Commissioner*, *supra*, to the effect that to do only what is necessary from an investment point of view is insufficient to amount to engaging in business, states:

> * * * The activities of the taxpayer's brother as to her investments and the employment for personal

247

convenience of a bookkeeper to record financial transactions, or of a bank to cut and collect coupons, did not, in our opinion, amount to the carrying on of a business. If so, every owner of property can obtain an income tax deduction of whatever sums he may expend to save the trouble of personal attention to his affairs. *Lloyd* v. *Commissioner,* 55 F. (2d) 842, (C. C. A.). There is no reason to suppose that the employment of a bookkeeper to keep accounts, or of a bank to make income collections, is more than a personal, as opposed to a business, expense.

248

Nothing further appears in the instant proceeding. The petitioner, as in *Kane* v. *Commissioner, supra,* employed others, largely to carry on his real estate business, as to which deductions are admitted by the respondent as allowable, and in a lesser degree simply to "keep accounts", to receive for deposit, keep records of, and report to him upon investments which he made from a foreign country through the United States Trust Co. of New York, in securities obviously selected for their attributes as investments and not primarily from the angle of profit and loss in dealing actively therein. There was no contention that he was a dealer in securities. To allow the deductions claimed in the present proceeding and to disallow them as was done in *Kane* v. *Commissioner, supra,* would be to make a distinction between the small investor and one investing like the petitioner upon a very large scale, for the nature of the expenses disallowed by the Commissioner obviously is the same in both cases. We can not make distinction merely because of the extent of investments or of expenses commensurate therewith.

249

Considering this proceeding upon the facts involved, different as it is in many respects from cases cited b both

250 petitioner and respondent, we conclude that the activities of the petitioner did not constitute the carrying on of a trade or business within the purview of section 23 (a) of the Revenue Act of 1932. We hold therefore that the petitioner is not entitled to deduct expense incurred on account of investments in securities, stocks, and bonds. We do not think that those cases wherein expenses have been allowed are on their facts determinative of the situation herein involved.

Petitioner contends that to disallow deduction of expenses incurred as to tax-exempt securities would be unconstitutional. We merely point out that he also relies upon
251 *John H. Watson, Jr., et al., Trustees,* 35 B. T. A. 706, to demonstrate that there is no distinction between tax-exempt and other securities as to deduction of business expenses. We think there is none, and therefore no violation of constitutional principles in disallowance of deduction of expenses on a common basis as to both tax-exempt and nonexempt securities.

Respondent argues particularly that, as to the expenses of petitioner's office in Paris, the maintenance of an office there was unnecessary and personal to the petitioner, and therefore the expense connected therewith was not deductible. We are not willing to say that one conducting a busi-
252 ness may not set up additional office facilities, and incur additional expense, when residing elsewhere than at the place of his principal business. We think it is within taxpayer's discretion as to what offices he maintains. The Paris office was a mere adjunct to that maintained in New York, and the division of effort and expense between investments and real estate business is logically upon the same basis. We therefore, considering the expense thereof ordinary and necessary business expense, allow deduction thereof upon the same basis as that of the New York office.

253

It seems necessary, in order definitely to dispose of this matter, to itemize the various deductions claimed, as treated by us in accordance with our conclusions above expressed: Of salary claims, since the evidence indicates that two-thirds of the office time and effort was devoted to real estate, we allow as deductions two-thirds of all salaries of the New York office, except that of Martin J. Dietz, all of whose time was devoted to real estate, and deduction of whose full salary is therefore approved. The Paris office being merely ancillary to that in New York, and logically upon the same basis, two-thirds of the salary of D. P. Cousteau is allowed as deduction. The strictly office expense in New York, denominated rent, stationery, radiograms, postage, petty cash, newspapers, and miscellaneous, are allowed as deductions to the extent of two-thirds thereof. As to legal expenses: For the year 1932, the item of $3,000, and disbursements of $189.02 in connection therewith arose from investment matters, and deduction is therefore disallowed. The items of $12,000 and disbursements of $100.69 connected therewith (and of $13,000 and $692.30 connected disbursements for 1933) are for business matters, as admitted by respondent, and deductions are therefore allowed. The item of $1,000 and $11.50 disbursements in connection therewith, arose from Federal and state income tax returns, and, in accord with our conclusion as to division between investment matters and real estate business, two-thirds thereof is allowed as deduction. The $1,500 item is agreed to be for advice as to investment in stocks and is disallowed under our conclusions above. The item of $2,500 for services with $113.03 disbursements, for the year 1932, and of $1,000 with $127.75 disbursements for the year 1933, are stipulated to be personal matters, and deduction thereof is therefore disallowed. The item of $2,500 with $10 dis-

254

255

256 bursements connected therewith, for 1933, is shown to have arisen from real estate matters, condemnation of New York real estate, as to $2,000 thereof, and $2,000 is therefore allowed in full as a deduction; the remaining $500 being allowed as a deduction as to two-thirds thereof, the same appearing to be for income tax matters in general. Deduction of the item of $1,000 for advice as to investments is disallowed. As to the Paris office expense, two-thirds thereof is allowed as deduction, and the item of $600 for depreciation is allowed in full for each year, under section 23 (k) of the Revenue Act as
257 property used in trade or business. It was so used. There seems no contention as to these Paris office items, except as to whether they are ordinary and necessary expense of trade or business. An erroneous overstatement of deduction in the amount of $969.21 is stipulated, as is a refund of $26.14, and respondent does not oppose an item of $90.71 for depreciation on the New York office furniture. These items will therefore be reflected accordingly in the deficiency.

39 B. T. A.

Decision will be entered under Rule 50.

258

Decision. 259

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

[SAME TITLE]

Docket No. 80052

Pursuant to the findings of fact and opinion of the 260
Board, promulgated May 24, 1939, the respondent on June 21, 1939, filed notice and computation under Rule 50. Copy of said notice and computation having been served on the petitioner, together with notice of hearing, and the proceeding having been called for settlement from the Day Calendar of July 5, 1939, at which time no objection to the proposed computation was offered, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the year 1932 in the amount of $25,716.32. Enter:

(Signed) R. L. DISNEY 261
Member.

(SEAL)

Entered Jul 11 1939

262

Decision.

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

[SAME TITLE]

Docket No. 85961

263. Pursuant to the findings of fact and opinion of the Board, promulgated May 24, 1939, the respondent on June 21, 1939, filed notice and computation under Rule 50. Copy of said notice and computation having been served on the petitioner, together with notice of hearing, and the proceeding having been called for settlement from the Day Calendar of July 5, 1939, at which time no objection to the proposed computation was offered, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the year 1933 in the amount of $6,597.81. Enter:

264 (Signed) R. L. DISNEY
Member.

(SEAL)

Entered Jul 11 1939

Petition for Review and Assignments of Error. 265

UNITED STATES BOARD OF TAX APPEALS

EUGENE HIGGINS,
Petitioner on Review,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

Docket No. 80052. 266

To the Honorable Judges of the United States Circuit Court of Appeals of the Second Circuit.

Now comes Eugene Higgins and hereby petitions for a review of the final decision of the United States Board of Tax Appeals promulgated May 24, 1939, and of the final order of determination entered July 11, 1939, and respectfully shows to this Honorable Court as follows:

I.

Your petitioner on review filed his income tax return 267
for the year 1932, which is the year in question herein, with the Collector of Internal Revenue for the Second District of New York, whose office is located in the Borough of Manhattan, City, County and State of New York, and within the jurisdictional circuit of the United States Circuit Court of Appeals for the Second Circuit.

II.

The Commissioner determined a deficiency in income taxes against petitioner for the calendar year 1932 in the sum of $126,730.08 and sent to petitioner by registered mail on March 11, 1935, in accordance with the provisions of Section 272 (a) of the Revenue Act of 1932, as amended

268 by Section 501 of the Revenue Act of 1934, a notice of said deficiency and thereafter petitioner took an appeal from said notice of deficiency by filing on June 1, 1935, a petition with the United States Board of Tax Appeals to review said deficiency.

Thereafter the United States Board of Tax Appeals consolidated said appeal with another appeal by said taxpayer involving the year 1933 and both appeals were brought on for a hearing together and disposed of by one opinion which was promulgated on May 24, 1939, and on July 11, 1939, the United States Board of Tax Appeals
269 entered an order wherein and whereby it was decided and ordered that the deficiency determined by the Commissioner for the year 1932 was erroneous and that the correct deficiency for 1932 was $25,716.32.

The opinion of the United States Board of Tax Appeals is reported in 39 B. T. A. 1005.

III.

The controversy involves expenditures of $76,498.38 made by taxpayer for salaries of employees, legal services, rent, and miscellaneous office expenses, in operating and
270 maintaining a business organization for the management of his very substantial investments in real estate, stocks and bonds, all of which expenditures were claimed by taxpayer as ordinary and necessary expenses paid in the conduct of business under Section 23 (a) of the Revenue Act. In fixing the amount of the deficiency so far as it involved these expenditures, the Commissioner did not question the propriety of the deduction of any of those expenditures as proper business expenses, but disallowed that proportion of them which taxpayer's nontaxable income bore to his entire income. On the hearing before

271

the Board, however, the Commissioner abandoned this contention and took the position that taxpayer was not engaged in business and therefore entitled to no deductions for business expenses, but was entitled to deduct those expenses which related to the management, protection and conservation of his real estate properties producing income.

The Board rejected taxpayer's contention that these expenditures were all incurred in the pursuit of a single business enterprise, that of managing investments, and held that the activities of taxpayer and his employees, so far as they had to do with real estate, was a business but so far as they had to do with securities was not a business and proceeded to apportion the salaries paid by taxpayer to his employees in proportion to the time it found they devoted respectively to real estate matters and matters pertaining to taxpayer's security investments. The rent and other office expenses were likewise apportioned. The Board allowed as deductions only that portion of the salaries, rent and other expenses it attributed to the real estate activities and rejected the balance as not having been expended in the conduct of a business.

272

The controversy also involves a matter of evidence. The Board assumed, in accordance with petitioner's contention, that the Commissioner having allowed the expenditures as proper business deductions, the burden was on him to show that they were not so expended. The Board found the proof sufficient to show that the items ruled out were not ordinary and necessary business expenses while petitioner contends that proof was not sufficient for that purpose and that it shows affirmatively that all the expenditures in question were paid in the conduct of a single business regularly carried on by petitioner.

273

IV.

Assignments of Error.

Petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The finding that respondent contended in the notice of deficiency for 1932 that investment in securities was not a trade or business and the failure to find that Commissioner's only explanation of the rejection of $38,487.40 of petitioner's business expense was as follows:

"7. The percentage of office and legal expenses applicable to tax exempt income has been disallowed as follows:

Gross taxable income		$ 636,593.99
Gross nontaxable income		$ 643,037.68
Total		$1,279,631.67
$ 643,037.68 / $1,279,631.67	of $76,589.14 equals	$ 38,487.41
Amount disallowed		$ 38,487.41
Less:		
Depreciation on office furniture		$ 90.77
Balance disallowed		$ 38,396.64"

2. The finding that at meetings of the Board of Control discussions were limited to matters pertaining to real estate.

3. The finding that the Board of Control had nothing to do with the petitioner's securities.

277

4. The finding that no one in the New York office made any recommendations or carried out any recommendations as to the purchase of nontaxable securities.

5. The failure to find that the Board of Control was charged with the duty of keeping petitioner informed of the amount of money he had available for investment and was called upon occasionally to advise concerning investments.

6. The finding that most of Gustav Zimmermann's time was taken up with real estate matters and sitting on the Board of Control. 278

7. The failure to find that petitioner had an established policy of his own for the investment of his surplus income and the reinvestment of his principal, which he strictly adhered to and which he was constantly trying to improve.

8. The failure to find that petitioner after careful studies of security investments adopted a policy of limiting the investment of his surplus income to seven or eight selected State and Municipal bonds and certain United States bonds. 279

9. The failure to find that in selecting investments and forming his investment policy petitioner closely followed the financial markets and trend of events, frequently consulted his banker, sought the advice of his Board of Control and his attorneys and had his employees make investigations for him.

10. The failure to find that after petitioner had thoughtfully considered possible investments he would

280 from time to time direct his banker to purchase for his account securities from a specified list of seven or eight State and Municipal bonds.

11. The failure to find that petitioner frequently rejected his banker's advice as to investments and directed it to make purchases contrary to its recommendations.

12. The failure to find that petitioner's instructions to his banker were direct and exact and the failure to precisely follow them brought from petitioner severe criticism
281 and even an investigation.

13. The failure to find that petitioner called Mr. Whitehead, his New York office manager, to his assistance occasionally in making his investments and his investment policy.

14. The failure to find that petitioner in 1933, after mature consideration, confined his purchases entirely to United States Liberty bonds.

15. The failure to find that petitioner himself attended
282 to the payment of the purchase price of all securities by orders to his banker.

16. The failure to find that petitioner himself directly paid his Federal and State income taxes, the taxes on his New York City real estate, his attorneys' fees and the purchase price of securities bought, either by check sent from Paris or by directions given to his New York banker.

17. The failure to find that in 1921 petitioner sold securities as follows:

283

\$165,000. Chesapeake & Ohio Gen. Mtge. 4½%, 1992
\$221,500. West Shore Railroad Co. 4%, 2361
\$200,000. New York Central 3½%, 1998
\$250,000. Union Pacific, 4%, 1947
\$200,000. Chicago & Northwestern, 3½%, 1987
\$500,000. Northern Pacific, 4%, 1997
\$200,000. Illinois Central, 3½%, 1953
\$ 43,000. City of New York, 3½%, 1949
\$ 50,000. Chicago & Alton, 3%, 1949
\$200,000. City of New York, 4%, 1936
\$200,000. Chicago, Burlington & Quincy, 4%, 1949.

284

\$ 59,000. City of New York, 4%, 1955
\$113,000. City of New York, 4%, 1956
\$847,000. City of New York, 4¼%, 1962
\$500,000. City of New York, 4¼%, 1960
\$400,000. City of New York, 4¼%, 1964.
\$300,000. City of New York, 4¼%, 1966

upon which taxpayer sustained a loss of \$587,856.01.

18. The failure to find that in 1921 petitioner received from the Delaware, Lackawanna & Western Railroad Company Rights to subscribe for 3100 shares of Glen Alden Coal Company.

285

19. The failure to find that owing to a misinterpretation of petitioner's instructions, his New York Office Manager sold these rights for a net price of \$98,273 less broker's commissions.

20. The failure to find that when the error was discovered petitioner ordered the repurchase of these Rights and 1471 additional Rights.

286 *Petition for Review and Assignments of Error.*

21. The failure to find that the Rights so repurchased were repurchased at an advance of $10,877 over the price at which they were sold, which petitioner claimed as a deductible loss on his tax return for the year 1921.

22. The failure to find that the Commissioner rejected this loss claimed by the petitioner and asserted a deficiency of $80,887.52 in 1921 income taxes on the theory that the entire amount received by the petitioner from the sale of the Right was taxable income to the petitioner in 1921.

287

23. The failure to find that pending the trial of an appeal taken to the Board of Tax Appeals on this controversy, the Commissioner filed an amended answer asserting an increased deficiency by including in taxpayer's income an item of dividends on account of the receipt of the Glen Alden Rights in the total amount of $733,911.75.

24. The failure to find that the matters involved in said appeal were settled in 1931.

288 25. The failure to find that petitioner was actively engaged in a single business undertaking, that of managing and directing investments of an estimated value of Thirty-five Million Dollars in improved and unimproved real estate, stocks, bonds and other miscellaneous investments.

26. The failure to find that petitioner is entitled to have allowed as a deduction from his gross income in 1932 the full amount of his ordinary and necessary expenses paid in the conduct of that business in 1932, aggregating the sum of $76,498.37.

Petition for Review and Assignments of Error.

27. The failure to find that the Commissioner in his letter of deficiency recognized the sum of $76,589.14 as petitioner's ordinary and necessary expenses in the conduct of business.

WHEREFORE, your petitioner prays that this Honorable Court may review the decision and final determination of the Board of Tax Appeals entered against him and that said deficiency and final determination be reversed and set aside and that a transcript of the record be submitted to the Clerk of said Court for filing and that proper action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

ORWILL V. W. HAWKINS,
Attorney for Petitioner on Review,
Office & P. O. Address,
No. 15 Broad Street,
Borough of Manhattan,
New York City, N. Y.

292 *Petition for Review and Assignments of Error.*

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ORWILL V. W. HAWKINS, being duly sworn, deposes and says:

That he is the attorney for the petitioner named in the foregoing petition for review; that he knows the contents of the foregoing petition and that the facts set forth therein are true to the best of his knowledge, information and belief and that the said petition is filed in good faith.

293

O. V. W. HAWKINS

Subscribed and sworn to before me }
this 20th day of September, 1939. }

JAMES S. OGSBURY, JR.
Notary Public,
Nassau Co., N. Y. No. 1870
Certificate filed in N. Y. Co., No. 180
N. Y. County Register's No. 0-O-105
My Commission expires March 30, 1940

294 (SEAL)

295

Notice.

UNITED STATES BOARD OF TAX APPEALS

[SAME TITLE]

Docket No. 80052

Sirs:

PLEASE TAKE NOTICE that the petitioner on review herein 296
did, on the 21st day of September, 1939, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board heretofore rendered in the above entitled appeal. A copy of the petition for review and assignments of error as so filed is attached hereto and served upon you.

Dated, New York, N. Y., September 25, 1939.

Yours, etc.,

297

(s) ORWILL V. W. HAWKINS
ORWILL V. W. HAWKINS,
Attorney for Petitioner on Review,
Office & P. O. Address,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

To:

GUY T. HELVERING, ESQ.,
Commissioner of Internal Revenue,
Washington, D. C.

298 *Petition for Review and Assignments of Error.*

JOHN P. WENCHEL, ESQ.,
Chief Counsel of the
Bureau of Internal Revenue,
Washington, D. C.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26th day of September, 1939.

(s) J. P. WENCHEL
299 Chief Counsel,
Bureau of Internal Revenue and
Attorney for Respondent.

Petition for Review and Assignments of Error.

UNITED STATES BOARD OF TAX APPEALS

[SAME TITLE]

300

Docket No. 85961

To the Honorable Judges of the United States Circuit Court of Appeals of the Second Circuit.

Now comes Eugene Higgins and hereby petitions for a review of the final decision of the United States Board of Tax Appeals promulgated May 24, 1939, and of the final order of determination entered July 11, 1939, and respectfully shows to this Honorable Court as follows:

Petition for Review and Assignments of Error.

301

I.

Your petitioner on review filed his income tax return for the year 1933, which is the year in question herein, with the Collector of Internal Revenue for the Second District of New York, whose office is located in the Borough of Manhattan, City, County and State of New York, and within the jurisdictional circuit of the United States Circuit Court of Appeals for the Second Circuit.

II.

302

The Commissioner determined a deficiency in income taxes against petitioner for the calendar year 1933, in the sum of $24,542.65 and sent to petitioner by registered mail on June 16, 1936, in accordance with the provisions of Section 272 (a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934, a notice of said deficiency and thereafter petitioner took an appeal from said notice of deficiency by filing on August 1, 1936, a petition with the United States Board of Tax Appeals to review said deficiency.

Thereafter the United States Board of Tax Appeals consolidated said appeal with another appeal by said taxpayer involving the year 1932 and both appeals were brought on for a hearing together and disposed of by one opinion which was promulgated on May 24, 1939, and on July 11, 1939, the United States Board of Tax Appeals entered an order wherein and whereby it was decided and ordered that the deficiency determined by the Commissioner for the year 1933 was erroneous and that the correct deficiency for 1933 was $6,597.81.

303

The opinion of the United States Board of Tax Appeals is reported in 39 B. T. A. 1005.

304 *Petition for Review and Assignments of Error.*

III.

The controversy involves expenditures of $72,842.34 made by taxpayer for salaries of employees, legal services, rent, and miscellaneous office expenses, in operating and maintaining a business organization for the management of his very substantial investments in real estate, stocks and bonds, all of which expenditures were claimed by taxpayer as ordinary and necessary expenses paid in the conduct of business under Section 23 (a) of the Revenue Act. In fixing the amount of the deficiency so far as it involved
305 these expenditures, the Commissioner while stating that taxpayer was not engaged in business disallowed only that proportion of those expenditures which taxpayer's nontaxable income bore to his entire income. On the hearing before the Board, however, the Commissioner abandoned his contention based on the theory of apportionment between taxable and nontaxable income and took the position that taxpayer was not engaged in business and therefore entitled to no deductions for business expenses, but was entitled to deduct those expenses which related to the management, protection and conservation of his real estate properties producing income.

306 The Board rejected taxpayer's contention that these expenditures were all incurred in the pursuit of a single business enterprise, that of managing investments, and held that the activities of taxpayer and his employees, so far as they had to do with real estate, was a business but so far as they had to do with securities was not a business and proceeded to apportion the salaries paid by taxpayer to his employees in proportion to the time it found they devoted respectively to real estate matters and matters pertaining to taxpayer's security investment. The rent and other office expenses were likewise appor-

307

tioned. The Board allowed as deductions only that portion of the salaries, rent and other expenses it attributed to the real estate activities and rejected the balance as not having been expended in the conduct of a business.

The controversy also involves a matter of evidence. The Board assumed, in accordance with petitioner's contention, that the Commissioner having allowed the expenditures as proper business deductions, the burden was on him to show that they were not so expended. The Board found the proof sufficient to show that the items ruled out were not ordinary and necessary business expenses while petitioner contends that proof was not sufficient for that purpose and that it shows affirmatively that all the expenditures in question were paid in the conduct of a single business regularly carried on by petitioner.

308

IV.

Assignments of Error.

Petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

309

1. The finding that at meetings of the Board of Control discussions were limited to matters pertaining to real estate.

2. The finding that the Board of Control had nothing to do with the petitioner's securities.

3. The finding that no one in the New York office made any recommendations or carried out any recommendations as to the purchase of nontaxable securities.

310

4. The failure to find that the Board of Control was charged with the duty of keeping petitioner informed of the amount of money he had available for investment and was called upon occasionally to advise concerning investment.

5. The finding that most of Gustav Zimmermann's time was taken up with real estate matters and sitting on the Board of Control.

6. The failure to find that petitioner had an estab-
311 lished policy of his own for the investment of his surplus income and the reinvestment of his principal, which he strictly adhered to and which he was constantly trying to improve.

7. The failure to find that petitioner after careful studies of security investments adopted a policy of limiting the investment of his surplus income to seven or eight selected State and Municipal bonds and certain United States bonds.

8. The failure to find that in selecting investments
312 and forming his investment policy petitioner closely followed the financial markets and trend of events, frequently consulted his bankers; sought the advice of his Board of Control and his attorneys and had his employees make investigations for him.

9. The failure to find that after petitioner had thoughtfully considered possible investments he would from time to time direct his banker to purchase for his account securities from a specified list of seven or eight State and Municipal bonds.

313

10. The failure to find that petitioner frequently rejected his banker's advice as to investments and directed them to make purchases contrary to their recommendations.

11. The failure to find that petitioner's instructions to his banker were direct and exact and the failure to precisely follow them brought from petitioner severe criticism and even an investigation.

12. The failure to find that petitioner called Mr. Whitehead, his New York office Manager, to his assistance occasionally in making his investments and his investment policy.

314

13. The failure to find that petitioner in 1933, after mature consideration, confined his purchases entirely to United States Liberty bonds.

14. The failure to find that petitioner himself attended to the payment of the purchase price of all securities by orders to his banker.

15. The failure to find that petitioner himself directly paid his Federal and State income taxes, the taxes on his New York City real estate, his attorneys' fees and the purchase price of securities bought, either by check sent from Paris or by directions given to his New York banker.

315

16. The failure to find that petitioner was actively engaged in a single business undertaking, that of managing and directing investments of an estimated value of Thirty-five million dollars in improved and unimproved real estate, stocks, bonds and other miscellaneous investments.

316 *Petition for Review and Assignments of Error.*

17. The failure to find that petitioner is entitled to have allowed as a deduction from his gross income in 1933 the full amount of his ordinary and necessary expenses paid in the conduct of that business in 1933, aggregating the sum of $72,842.34.

18. The failure to find that the Commissioner in his letter of deficiency recognized the sum of $74,502.25 as petitioner's ordinary and necessary expenses in the conduct of business.

317 WHEREFORE, your petitioner prays that this Honorable Court may review the decision and final determination of the Board of Tax Appeals entered against him and that said deficiency and final determination be reversed and set aside and that a transcript of the record be submitted to the Clerk of said Court for filing and that proper action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

ORWILL V. W. HAWKINS,
Attorney for Petitioner on Review,
Office & P. O. Address,
318 No. 15 Broad Street,
Borough of Manhattan,
New York City, N. Y.

319

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ORWILL V. W. HAWKINS, being duly sworn, deposes and says:

That he is the attorney for the petitioner named in the foregoing petition for review; that he knows the contents of the foregoing petition and that the facts set forth therein are true to the best of his knowledge, information and belief and that the said petition is filed in good faith.

320

O. V. W. HAWKINS

Subscribed and sworn to before me
this 20th day of September, 1939.

JAMES S. OGSBURY, JR.
Notary Public,
Nassau Co., N. Y. No. 1870
Certificate filed in N. Y. Co., No. 180
N. Y. County Register's No. 0-O-105
My Commission expires March 30, 1940

(SEAL)

321

322

Notice.

UNITED STATES BOARD OF TAX APPEALS.

[SAME TITLE]

Docket No. 85961

Sirs:

323 PLEASE TAKE NOTICE that the petitioner on review herein did, on the 21st day of September, 1939, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board heretofore rendered in the above entitled appeal. A copy of the petition for review and assignments of error as so filed is attached hereto and served upon you.

Dated, New York, N. Y., September 25, 1939.

Yours, etc.,

324

(s) ORWILL V. W. HAWKINS
ORWILL V. W. HAWKINS,
Attorney for Petitioner on Review,
Office & P. O. Address,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

To:

GUY T. HELVERING, ESQ.,
Commissioner of Internal Revenue,
Washington, D. C.

325

JOHN P. WENCHEL, ESQ.,
Chief Counsel of the
Bureau of Internal Revenue,
Washington, D. C.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26th day of September, 1939.

(s) J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue and
Attorney for Respondent.

326

Statement of Evidence.

UNITED STATES BOARD OF TAX APPEALS

[SAME TITLE]

327

Docket Nos. 80052 and 85961

The following is a statement of the cases by respective counsel and evidence submitted to the Board of Tax Appeals in the above entitled appeals, so far as is necessary to the assignments of error as filed, reduced to narrative form:

328 *Statement of Evidence.*

STATEMENT OF CASE IN BEHALF OF PETITIONER BY MR. HAWKINS.

These cases involve the income tax return of Eugene Higgins for 1932 and 1933. There were several issues originally but we have succeeded in adjusting all of the issues except one, and that issue is involved for each of the years.

The question to be determined is whether or not the taxpayer is entitled to have deducted from his gross income his business and legal expenses. Taxpayer is a 329 man of considerable means and maintains offices here and in Paris for the conduct of his affairs. The deductions claimed amounted in the neighborhood of $75,000 for each of the years.

They were allowed to the extent of approximately one half on the theory that the taxpayer was not permitted to deduct any of his expenses for non-taxables, and the expenses claimed were apportioned on that basis. We complained because they were not allowed in full.

The Member: Do we have some recent decisions on that?

Mr. Hawkins: Yes, I think your Honor considered 330 that case recently in the case of Cornelia W. Roebling. That was before the Board.

The Member: It is a question of the non-taxables.

STATEMENT OF CASE IN BEHALF OF RESPONDENT BY MR. REILLY.

I think it is not a question of the nontaxables. Perhaps I can make a little more complete statement of the respondent's case so that you will know what we expect to do here and the question we expect to present to the Board.

331

Now, of course, a written stipulation of facts has been prepared, signed by the parties, and that will be presented and, in addition, there will be oral evidence.

This stipulation of facts will dispose of all of the issues except the one being presented to the Board. It also disposes of some facts with respect to the issue presented to the Board.

Petitioner, as counsel for petitioner has stated, is a very wealthy man and his wealth runs into many millions of dollars. His income in the years here before the Board was derived almost exclusively from three sources: first, rentals received; second, dividends received; and third, interest received.

332

He was not in the United States any time during the years 1932 or 1933. All of his income producing wealth is invested in the United States. In other words, he derives no income from foreign sources. A very large part of his income is interest on exempt securities.

Among the deductions claimed by the petitioner in his 1932 return is an item of $76,498.37, designated in the return as "other deductions". A like item is claimed in the 1933 return, except that the amount is $74,502.26.

The petitioner claims that these amounts are deductible as ordinary and necessary expenses incurred or paid in carrying on of trade or business. Respondent's contention is that a substantial part of these amounts are not ordinary and necessary expenses incurred or paid in the carrying on of a business. In other words, that is the issue which is to be presented to the Board: what part of these expenses can be said to constitute ordinary and necessary expenses incurred or paid in the carrying on of the business of the petitioner. That is the issue. I will proceed a little further and bring out the point Mr. Hawkins made.

333

Statement of Evidence.

334 We contend the nature and purpose of the numerous expenditures aggregating approximately $76,000 in 1932, and approximately $74,000 in 1933, should be examined and each expenditure determined as to whether it is deductible or not on the facts applicable to that particular expenditure.

The Commissioner, in the notice of deficiency, did not specifically point out particular expenditures to be disallowed. Instead, he disallowed in each year a percentage of the total amounts claimed as ordinary and necessary expenses.

335 For the year 1932 he disallowed approximately $38,000 out of approximately $76,000, and for 1933 Commissioner disallowed approximately $48,000 out of approximately $74,000 claimed.

In disallowing that amount, he merely took that fraction of the ordinary and necessary expenses claimed which the taxpayer's exempt interest bore to his total gross income.

We will contend that the amounts claimed by the petitioner as ordinary and necessary expenses should not be allowed as deductions unless they are incurred in the carrying on of a trade or business. Respondent says that
336 petitioner's activities in 1932 and 1933 did not constitute the carrying on of a trade or business.

Respondent will admit, however, that the petitioner is entitled to deduct those expenses which relate to the management, protection and conservation of his real estate properties producing income.

He owns considerable real estate in the City of New York, and we believe that the expenditures which relate to the management, protection and conservation of his real estate are proper deductions, but we believe the deductions should be limited to those.

337

Now, respondent will contend that those expenses which relate to other matters, including the expenses connected with collecting of dividends and interest regardless of whether the interest is exempt or not exempt, and expenses connected with the investment of money in securities, does not constitute ordinary and necessary expenses connected with a trade or business carried on by the petitioner. That is what Mr. Hawkins had in mind when he referred to the Roebling case.

I might also refer at this time to the Kales case and the Heilbronner case. Those three cases seem to be the most recent decided by the Board. Two were decided one way and the third case decided the other way.

338

Respondent will not contend that the measurement of the disallowing of the amount was proper measurement. We do not say that the apportionment should necessarily be as between taxable and non-taxable income, but that it should be examined as to whether it is expended in connection with the regular trade or business carried on or not.

I think that states respondent's position sufficiently for you to understand what we are driving at here.

339

MARTIN J. DIETZ was called as a witness by petitioner, after being duly sworn, and testified as follows:

I am employed in the New York office of Eugene Higgins as Office Manager and have been so employed since October, 1937. Before that, I was Assistant to Mr. Whitehead who was then Office Manager and I have been employed in Mr. Higgins' office since April, 1908. In 1931, 1932 and 1933, my work was almost exclusively in connection with real estate in the collection of rents, nego-

340 tiation of leases and seeing that the tenants complied with all of the many City and State ordinances.

Mr. Higgins has two offices, one in New York and one in Paris, France. In 1931, 1932 and 1933, Mr. William S. Whitehead was Office Manager in New York. I was his assistant and Mr. Gustav Zimmermann was the accountant. Mr. Besenbeck was stenographer and clerk. During the same years, the personnel of the Paris office consisted of Mr. D. P. Cousteau.

Mr. Higgins rents his New York office which is at No. 50 Union Square East and consists of a suite of four 341 rooms where all of Mr. Higgins records are, and the activities of his business in this country are conducted.

Mr. Higgins has an organization known as the Board of Control which in 1931, 1932 and 1933 consisted of three members, namely: Mr. Whitehead, Mr. Zimmermann and Mr. Marshal Stearns. The duties and functions of this Board of Control are to pass on all applications for leases which, if favorably passed by the Board, are presented with its recommendation to Mr. Higgins. The Board also passes on all payments which are made in New York with the exception of the payment for Federal and New York income taxes and the New York City real estate tax, and 342 attorneys' fees. These taxes and attorneys' fees Mr. Higgins pays directly after we send him the amounts asking him for the check. If sufficient time is not at hand, we ask him to cable one of the banks here in New York to authorize the payment.

The Board of Control meets on Tuesdays and Fridays of each week unless either of those days falls on a holiday.

The three members get together at these meetings and discuss anything that has been presented to Mr. Whitehead who was at that time the Office Manager pertaining only, however, to the real estate. Minutes are kept of the

343

meetings of the Board which are sent directly to Mr. Higgins. A copy of the minutes is kept in New York.

The Board of Control has been in existence for thirty years to my knowledge.

Back in the fall of either 1908 or 1909, when I was the stenographer for Mr. Higgins, Mr. Higgins called me in and asked me to take some dictation which I took and transcribed. After I transcribed it, I returned it to Mr. Higgins. (Mr. Hawkins handed the witness a paper which he identified as a photostatic copy of the paper which he had transcribed. This was marked for identification as Petitioner's Exhibit 1.)

344

The Board of Control has nothing to do with Mr. Higgins' securities. They have only to do with his real estate and the passing on authorization of all payments that are made through the New York office with the exception of those heretofore mentioned.

The Board of Control authorize all payments in New York except those mentioned. I was not a member of the Board of Control in 1930, 1931, 1932 and 1933 but I usually attended the meetings of the Board in those years.

Among Mr. Higgins' properties, there is vacant land and improved properties which are vacant. Mr. Higgins has about twenty properties under long term leases varying from 21 years to 999 years. The usual method for negotiating a long term lease is for a broker to call at the office and ask for information pertaining to the piece of property in which he is interested. The information and facts are given to him and perhaps a week or two weeks later, he will call again and we continue this negotiation until such time as the prospective tenant is prepared to make us an offer or proposition. After we find out the financial stability of the prospective tenant and go into his various references and that the proposition

345

346 seems in accordance with Mr. Higgins' instructions, it is then presented to the Board who in turn will go over the matter and if in their opinion it merits transmission to Mr. Higgins it is then and there sent to Mr. Higgins. If Mr. Higgins is interested, he will come back with either one of two things: Either that some of the terms do not suit him, or he will accept the offer. If the offer is accepted by Mr. Higgins, the next procedure is to visit the office of Duer, Strong & Whitehead and have a tentative form of lease prepared which then is taken either to the prospective tenant or his attorney, or both, and the various
347 conditions of the lease are argued. When it is in final shape, we take it to Duer, Strong & Whitehead if necessary and if the terms are satisfactory, we have the lease printed, taken to the tenant for signature, take to the office of Duer, Strong & Whitehead for approval by instructions from Mr. Higgins, brought back to our office and sent to Mr. Higgins for signature. By long standing instructions of Mr. Higgins, we are required to have the approval of Duer, Strong & Whitehead, his attorneys, endorsed upon any document to be signed by him. This endorsement must be in two places; on the first page and directly opposite and to the left side of the place where Mr. Hig-
348 gins' signature is to be placed. No employee or counsel or anybody at all has any authority to sign any document for Mr. Higgins and in my thirty years experience no one has signed any of Mr. Higgins' leases but himself.

In addition to the long term leases, we have what are known as short term leases, negotiations for which are not usually so lengthy but they are nevertheless put up to the Board of Control. An applicant for a short term lease will come in and say, "I see you have a piece of property, how much do you want for it and what lease will you give?" We usually say we will draw a lease

up to two years with a ten to thirty day cancellation clause in it. We usually fill in a clause approved or drawn by Duer, Strong & Whitehead some years ago. It is put up to the Board of Control, noted on the minutes and sent to Mr. Higgins for signature. On these leases, after they have had final approval in accordance with Mr. Higgins' instructions, and after being signed by him and returned, a copy is sent to the tenant with a form of receipt for him to acknowledge receiving the copy. Mr. Higgins' specific instructions are not to entertain any leasing proposition from anyone who is not financially and morally responsible and no lease is ever sent to Mr. Higgins until it has been signed by the tenant. I tell tenants there is no contract until the lease is returned with Mr. Higgins' signature thereon but always accept rent tentatively.

In 1931, 1932 and 1933 my duties were to attend to the negotiation of leases, seeing to it that all rents were paid; appearing before City Tax Board for reduction in assessment; whenever fire occurred to visit property and arrange with insurance company and adjusters; supervise all repairs, whenever an accident occurred on the property; to institute dispossess proceedings; take care of tenants' complaints; see that the many State and City Department and Bureau orders are attended to by the tenants, and those pertaining to our property to see that they are properly taken care of; visit the various tenants from time to time; interview brokers in the office and outside.

During the past six or seven or eight years now and then a tenant would not be able to pay taxes, begin slipping on the payment of rent and generally did not carry on according to the terms of the contract. When in our opinion—and when I say our opinion I mean the opinion of the Board as well as our office—we felt that the tenant

352 could do better with the property than we could if we took it back we arranged a modification of the lease. In every case so far these modifications have been carried out. In working out those modifications I would negotiate with the tenant, have his books examined by accountants, find out how much money he was making on the property, what disposition was being made of that money and then arranged a basis of a new rental so to speak or a temporary rental until such time as the business conditions became more or less normal again. That proposition would then be presented to Mr. Whitehead, then our Office
353 Manager. If he felt well enough about it, he would present it to the Board of Control. If they passed on it, Mr. Whitehead would then write the opinion of the Board, as well as his own conclusions and those of Mr. Zimmermann and myself to Mr. Higgins and await word from him and when he was satisfied we would complete the negotiation. Duer, Strong & Whitehead would draw up a form of modification and the tenant would sign it and it would then be sent to Mr. Higgins for signature and upon its return, one copy was sent to the tenant.

Mr. Higgins seldom accepted the recommendations of the Board of Control in total. He usually had something
354 —either he wanted more money or the first term of the lease was too long or he wanted the first three terms of the lease changed. Very seldom did he come back and accept a proposition exactly as presented to him.

Almost invariably upon receipt of a letter from our office, if the terms were somewhat near to his liking, he would either cable or radio. He is a prolific user of the cable and radio.

The witness was handed a booklet containing diagrams of real properties. The diagrams in this booklet show all of Mr. Higgins' properties in New York City, except the

355

property 554 West 43rd Street, which Mr. Higgins foreclosed in 1932. The little slip accompanying each one of these diagrams, shows the street numbers of the properties, description of the improvements, and the 1932 assessments of both land and buildings and total. The property 554 West 43 Street was assessed to the best of my recollection for land $43,000 and for building $20,000.

The booklet was admitted in evidence as Petitioner's Exhibit No. 2.

In addition to these properties, Mr. Higgins owns two one acre plots in Pelham Manor, New York, and a small piece of one and three-quarter acres in Morristown, New Jersey, all unimproved and vacant.

356

Generally speaking, Mr. Higgins' policy with respect to his real property has been never to sell anything. I don't recall that he sold anything since 1926. Since 1923, Mr. Higgins has sold the following real properties:

12-14 Warren Street	September 4, 1924
440 Pearl Street	August 29, 1923
424 and leasehold interest in 426 Broadway	March 13, 1925
667-677 Broadway, running through Mercer Street	December 11, 1923
544-546 West 43 Street	October 5, 1926
554-556 West 43 Street	October 5, 1926
About 100 acres in Morristown, New Jersey	May 5, 1927
Small piece on 102 Street, running through to 101 Street	June 18, 1924.

357

Ever since I came to the office in 1908, Mr. Higgins' business was conducted through the Board of Control and by his employees, as I have heretofore testified. Mr. Higgins has his finger on every piece of business and we

358 follow his instructions. The principal activity in Mr. Higgins' New York office is the management of his real estate. We have something to do with his other affairs but principally it has to do with the management of his real estate.

All of the property shown on Exhibit 2, Mr. Higgins owned as far back as 1921. Some of them have been improved since.

---

359 MR. DIETZ recalled, testified as follows:

I was in Paris recently and there met Mr. Higgins and Mr. Cousteau and observed the layout there. Mr. Higgins' Paris office consists of a small two story building. The second floor is entirely occupied as an office. It consists of several rooms, containing filing cabinets, desks, typewriters —sort of a library.

In conversation with Mr. Cousteau, I learned that he attends to all Mr. Higgins' correspondence on receipt of accounts, letters—on receipt of accounts from our office, he replies and takes Mr. Higgins' dictation and replies to the
360 New York office; takes care of posting mail to us, sending all cablegrams and radiograms.

Upon cross-examination, Mr. Dietz testified as follows:

Mr. Cousteau's activities include matters pertaining to both Mr. Higgins' real estate interests and investments in stocks and bonds and securities.

In 1932 and 1933 I had nothing to do with any other part of the business other than real estate.

I know nothing about the item of the Paris attorneys' fees. That was a European matter. I would say the Paris office building would measure about 50 x 20. It is not connected with Mr. Higgins' residence.

Statement of Evidence.

361

GUSTAV ZIMMERMAN was called as a witness by petitioner and after being duly sworn, testified as follows:

I am employed by Mr. Higgins as bookkeeper and have been sitting on the Board of Control since 1908. I have been employed by him for 48 years. I sit on the Board of Control and participate in all decisions, in the discussions and so on. The minutes of the meeting are prepared generally by the head of the office and I sign them as one of the Board. It is the practice for all of the members attending to sign the minutes.

362 The witness was shown a photostatic copy of a typewritten memorandum and stated that it was a copy of a paper that he first saw in 1902 or 1903 at which time Mr. Higgins gave it to him and said that is the way he wants the affairs of the office conducted. The photostatic paper was then admitted in evidence as petitioner's Exhibit 1.

We make a weekly report of receipts and disbursements which is sent to Mr. Higgins every Friday and beside that there is an annual report of receipts and disbursements which shows the percentage earned on Mr. Higgins' investments of real estate and stocks and bonds. Against each individual parcel of real estate and each item of securities there is shown the percentage that it earns. That is a 363 voluminous document and takes about two weeks to prepare and about one week to type.

My principal duties are the keeping of the books and sitting on the Board of Control. I generally prepare Mr. Higgins' Federal and State income tax returns with the help of attorneys and little odds and ends that come up in the office. I have nothing to do with Mr. Higgins' investments and securities, so far as making any recommendations or anything of that kind is concerned.

Mr. Higgins' securities are kept in two boxes, one of which only he has access to and another one where Mr.

364 Stearns and Mr. Whitehead of the Board of Control have access which contains securities bought from time to time. The box that no one is permitted to enter except Mr. Higgins contains mostly tax exempts together with railroad bonds. Perhaps one-half of his tax exempt securities, or a little bit more, are in that box.

I have signed a good many minutes of the meetings of the Board of Control and there are always recorded therein expiration of leases three months before the expiration and propositions for new tenants.

365 All of Mr. Higgins' nontaxable securities are fully registered in Mr. Higgins' name as to principal and interest. There are no coupons attached. The interest is paid by check at stated six-month periods. Mr. Whitehead opens the interest checks when he is in. If he is not in, I would open the envelope and make the deposit. The big deposit days in 1931, 1932 and 1933 were four times a year. A record of the interest payments is made in our cash book and in the interest registry. So far as the principal is concerned, when the bonds are brought up from the trust company, after they are bought and fully registered and are delivered to the office, I check them off with Mr. Whitehead to see that they correspond with the list that they say they had bought and
366 what the list said on the desk. Then Mr. Whitehead and Mr. Stearns go to the safe deposit vault, deposit the bonds and that ends it.

The United States Trust Company takes care of Mr. Higgins purchases of securities and we have absolutely nothing to do with them, either as to recommendations or as to carrying out recommendations or anything of that kind.

The witness was shown a paper containing a list of bonds which he identified as containing the negotiable securities bought by Mr. Higgins in 1932 and 1933. The paper was admitted in evidence as petitioner's Exhibit No. 3.

367

Mr. Stearns is one of the attorneys at Duer, Strong & Whitehead and the third member of the Board of Control. In 1931, 1932 and 1933, he was Mr. Higgins' personal counsel.

The witness was shown a paper containing a list of securities which he identified as containing securities sold in 1921 by Mr. Higgins. This paper was admitted in evidence as petitioner's Exhibit 4.

All of Mr. Higgins' income comes to his New York office in the shape of rents, checks for interest, coupons, checks for dividends and other items of that kind, all of which is deposited to his account. Mr. Higgins had two bank accounts, one in the National City Bank and one in the United States Trust Company. In these two accounts of Mr. Higgins, income was deposited. No one has ever had any authority to withdraw any funds from either of those bank accounts. Mr. Higgins must sign all checks on those two accounts. There is another account in the Chase Bank which is kept in Mr. Higgins' name and Mr. Whitehead and Mr. Stearns sign checks on that account. Checks from Mr. Higgins go into that account. I make out checks for $5,000, send them to Mr. Higgins for his signature and endorsement to be deposited in this account. He sends us these checks one at a time as we need money for office expenses, repairs and the like. We use the money and then he replenishes with another check. Disbursements for office expenses and salaries are made from this account but no securities are paid for out of it.

368

369

Mr. Higgins borrowed no money to invest in nontaxables.

I have a copy of Mr. Higgins' 1932 Federal income tax return and am looking at the schedule of deductions claimed in line 18, Schedule F. I find there an item of stationery, which represents writing paper, ink and the general run of

370 stationery for office use. There is nothing there but stationery for office use.

The item of radiograms $476.75, were sent in connection with Mr. Higgins' business.

The item of postage $150.60 was postage used, all in connection with Mr. Higgins' business.

The item of $70 petty cash was for carfares, office help and little incidentals that we pay out here and there for something that comes up that it is not worth while making out a check, all expended in connection with Mr. Higgins' business.

371 Newspapers $189.57 is for Real Estate Bulletins, Financial Chronicle and the Commercial Bulletin. We send one to Mr. Higgins and we keep one. There are also some daily newspapers in that which we send to Mr. Higgins. All these papers are used in connection with Mr. Higgins' business. We send other periodicals and papers, such as the Chess Bulletins and things like that of a personal nature to Mr. Higgins but those are charged to him personally. I strive carefully to keep out Mr. Higgins personal matters from any business charges that I make.

Miscellaneous items of $853.96 includes $360 to the audit company, Christmas gifts for help in the building $17, and
372 items of that general nature. The audit is the audit of Mr. Higgins' business tax.

Referring to Mr. Higgins' 1933 return, line 18, there are the same items of stationery, radiograms, postage, petty cash, newspapers and miscellaneous. These are expenses of the same nature as those expended in 1932 but are for different amounts.

Mr. Zimmerman was then cross-examined and testified as follows:

I know Mr. Higgins personally and saw him for the last time in 1921 in the office at New York. Since 1921 until now,

373

he has been in Europe, particularly in France. He has not been in the United States since 1921. Mr. Higgins has no business, that is, in dollars and cents in France or Europe. He is there probably because he likes to live there, for his own pleasure and his health.

Mr. Higgins invests in registered bonds because he wants to be in control of his money and handle it all himself. He does not want to have anybody clipping coupons on his bonds and prefers to have the interest coming in the form of checks. Mr. Higgins' approximate wealth in 1932 was about thirty-five or thirty-six million dollars.

374

In the office in New York were kept records of Mr. Higgins' real estate enterprises and also of his stocks and bonds. Most of the work in the New York office is caused by real estate investments. I could not answer in percentage what portion of the expenses in the New York office is attributable to taking care of investments in stocks and bonds as distinguished from his investments in real estate enterprises but the receiving of tax exempt interest twice a year from many of the investments is almost negligible; for instance on the first of January and July it will take me an hour to make the entries. It will take us another hour to make the deposit slips, then we go downtown and that is all there is to that.

375

The rents take up more time because they come in piecemeal, come in various times in the month. We have to prepare then our weekly statements that we send to Mr. Higgins. We have a record of the interest and dividends that are to be received from the various securities. We know when they are not received on the due date. We know that on the first delivery of the mail. Our weekly reports include information with respect not only to the real estate but also with respect to Mr. Higgins' securities. In the weekly

376 reports, tax exempts take up quite an item on the first quarterly months of the year but the others equally so or even more so. The annual report does not contain anything of individual tenants, it is collectively on tenants but the annual report gives the individual return from each individual investment. The annual report takes up three solid pages for just real estate and the remainder represents matters concerning Mr. Higgins' securities. The entire annual report is about sixteen pages.

I keep Mr. Higgins' books. Most of my time is con-
377 fined solely with respect to Mr. Higgins' real estate activities, in sitting on the Board, listening to propositions Mr. Dietz brings in. I keep the books and have to keep accounts of the various securities and of the interest from various sources and dividends from various sources. Accounts must be kept for all of them just as accounts must be kept for the rentals received from the various tenants. But money that comes in from the real estate requires a great deal more time than that which comes from the tax exempts because you make one entry for the tax exempts in the book of registry and you have it finished for the year. And twice a year we get the interest just as it comes in, $100 or $200, as the case may
378 be. Whereas for real estate, it comes in every month—quite a little difference in time.

Considering all of Mr. Higgins stocks and bonds, including the tax exempts, I would say, two-thirds of my time is taken up with real estate and the other one-third with all other interest and dividends. And I would say that in 1932 and 1933, the same would be true with respect to Mr. Whitehead's time. In 1932 and 1933, Mr. Dietz was in charge of the real estate.

Mr. Besenbeck spends very little time making deposits at the bank. The rest of his time is as stenographer and

379

general office helper. In 1932 and 1933 Mr. Dietz did the main work pertaining to Mr. Higgins' correspondence and Mr. Besenbeck did the rest of it for the office—correspondence to tenants and any one like that. Mr. Dietz had the important correspondence. He was concerned particularly with the real estate and Mr. Besenbeck had nothing to do with the real estate. The stenography work done by Mr. Besenbeck pertained to the real estate but I differentiate between Mr. Dietz and Mr. Besenbeck. Mr. Dietz had to look for prospective tenants, listen to kicks, see that the various violations were carried out and taken care of, that was his part. Mr. Besenbeck wrote a great many of those letters that went to tenants and to the Departments of the City or State, as the case may be. Nearly all of Mr. Besenbeck's time was confined to matters pertaining to real estate. The only other work he had to do was to run to the bank and make a deposit. When he went to the bank and made deposits, very likely that was for rentals received and other items of dividends received.

380

I know Mr. Cousteau. His duties are to check off the accounts that we sent to him, the weekly statement. He keeps track of it and is the stenographer for Mr. Higgins. I can not say whether he takes care of Mr. Higgins' personal affairs in France. I hardly think he does because he keeps pretty close tabs on what we do in the City here in New York. He could not spend any time on personal work. He could hardly get a minute to do it. Mr. Higgins and Mr. Cousteau both keep pretty close tabs on what we do here in New York. I imagine wherever Mr. Higgins lived he would have to have a secretary to take care of the great correspondence between the lawyers and our office.

381

All the statements that I have made with respect to the activities of the New York office were the same in

382 1933, as in 1932 and in 1931. Mr. Higgins' affairs have been managed since 1889 just the same as they were in 1932 and 1933.

To the best of my knowledge, there is a duplicate set of records kept in France. Duplicates of the records which are kept in New York. I have never been in Paris, so I dont' know but I know that some years ago we made up two sets of books the same as we have in the office. One set to be kept in Paris and one set to be kept here and on two different occasions we sent to Paris to Mr. Higgins a duplication of our books.

383 The photographs of Mr. Higgins' office in Paris show the big house and the wings where the garages are and where the servants are and then the other wing is his office. We have photographs of that in the office and I believe he has a private office in the big house, in the mansion you might say. I have no way of telling how much of Mr. Higgins' time is devoted to the active management of his affairs.

Mr. Higgins has a sea-going yacht.

In the early days, Mr. Higgins was on the Board of Managers of the Delaware, Lackawanna & Western Railroad Company. In 1931, 1932 and 1933, the extent of
384 Mr. Higgins activities in the corporate enterprises in which his money was invested, was to receive reports and keep track of the dividends and interest he received. Real estate took up the greater part of the office's attention in 1932 and the same in 1933. Mr. Higgins prefers to invest in long term bonds rather than short term bonds. Very likely it is to avoid the annoyance of having to find new investments when they became due. A very safe way of making investments.

The records of Mr. Higgins' real estate enterprises and investments in securities are all kept in one set of

385

books but there are separate accounts for them. The interest and dividend checks which come to Mr. Higgins' office are endorsed by rubber stamp. The customary rubber stamp that you endorse a check with reading, "Pay to the order of such and such a bank" that is, the one bank only which we deposit in.

If the stock which Mr. Higgins owns in the various corporations is voted, he votes it. He does not appoint any one in his New York office to do so.

In the schedules of expenses attached to the 1933 return is an item Paris office expenses $1331.27 of which $1058.38 was stipulated as an item of lawyers fees. I do not have any knowledge of what that particular fee was spent for. We just got a statement of a lot of other figures from Mr. Higgins and he just states that as the figure. He gives a resume of the expenditures he has made in various things for the previous year.

386

The rent item shown as expenses in the schedules attached to the 1932 and 1933 returns is the rent for the New York office. As to the other items stationery, radiograms, postage, petty cash and newspapers, those items refer both to real estate and Mr. Higgins' other activities, but I would say practically all the expenditures are pertaining to real estate. Some of the periodicals relate entirely to real estate, others to stocks and bonds—the financial papers.

387

On redirect examination, Mr. Zimmermann testified as follows:

The duplicate set of books Mr. Higgins keeps in Paris is of our cash book and the registry of dividends and interest. Mr. Higgins is in contact with his office here by cable or letter almost daily, in addition to the occasions when we write and send him twice weekly the Board of Control minutes and the reports. It is nothing unusual

388 when we are negotiating a lease to have a couple of cables a day. If it were not for Mr. Higgins' securities and other investments, we would be able to get along and run the office with less help than we have now. If we had nothing to do with Mr. Higgins' securities, I guess we could do without a bookkeeper pretty well. I guess we could get on without a stenographer pretty well if the real estate man did all that. On account of Mr. Higgins' investments we need at least a bookkeeper and an office boy. Mr. Whitehead and Mr. Dietz could have done all the real estate work because that was most of
389 the work involved in the office.

Batch of letters and telegrams each identified by an alphabetical letter admitted in evidence as Petitioner's Exhibit No. 5 . It was stipulated by the attorneys that the cable address of the United States Trust Company is "Tristam" and that Mr. Higgins' New York office cable address is "Glen".

ORWILL V. W. HAWKINS was called as a witness by peti-
390 tioner and, after being duly sworn, testified as follows:

I am an attorney at law of the State of New York and a member of the firm of Duer, Strong & Whitehead, and am the attorney for petitioner in these proceedings.

I am familiar with the claim that was made by the Commissioner of Internal Revenue for additional Federal income taxes against Mr. Eugene Higgins for the year 1921. Mr. Higgins, by reason of his large holdings in Delaware, Lackawanna & Western Railroad Company stock, was entitled to 3,000 odd rights to subscribe to the shares of stock of the Glen Alden Coal Company organized

391

in 1921 by the Delaware, Lackawanna & Western Railroad Company.

Through misinterpretation of Mr. Higgins' instructions, Mr. Whitehead, who was then Mr. Higgins' Office Manager, sold a large quantity of those rights and as soon as Mr. Higgins discovered it he authorized Mr. Whitehead and Mr. Stearns to repurchase an equal number of rights. As a matter of fact, I think he bought a few more than were sold to replace the ones which had been sold. But the market had gone up in the meantime and they had to pay more for the new rights than they had received for the old ones.

392

When it came time to file Mr. Higgins' income tax return, a claim was made for loss on that transaction. The loss was rejected and the Commissioner took the position that inasmuch as Mr. Higgins had sold his rights, the entire amount of the receipts from those rights which had been erroneously sold was taxable and asserted a claim of a considerable amount—I think something like $80,000, as a result of that transaction.

Mr. Higgins did not agree to that: He took an appeal to the Board of Tax Appeals and while that was pending, the Commissioner conceived a new idea as to tax liability and claimed, in addition to the value of the rights he had received, a certain return from the capital he had invested in the Railroad Company stock and asserted a very much larger deficiency.

393

Sometime during the course of these negotiations—I don't know just where the negotiations were at the time or where the dispute was at the time—but I know it was in January, 1926 that Special Counsel was employed, Holmes, Paul & Havens, to represent Mr. Higgins' interest in that matter. They filed a petition with the Board of Tax Appeals and there were hearings and negotiations

394 for a long time. Finally the claim was settled in 1931 for the original amount claimed. The Government abandoned their new theory and went back to the old theory and settled on that basis.

A part of the bill for services of Duer, Strong & Whitehead for the year 1931, which was paid in 1932, represented some of those services. Mr. Stearns, who was then my partner, was personal counsel to Mr. Higgins, negotiated or conferred with Special Counsel and Mr. Higgins. The contact with Mr. Higgins was through Mr. Stearns. There were a large number of conferences dur-
395 ing the period from January 1, 1931 to June 1, 1931 between Mr. Stearns and Special Counsel and Mr. Stearns was in considerable communication with Mr. Higgins during that time concerning the settlement and final adjustment.

There also arose some question about the fee of Special Counsel and that was settled in the same period.

Mr. Hawkins was then cross-examined and testified as follows:

In paragraph 8 of the stipulation of facts, under Legal Expense, there is an item of $3,000. That represents the payment made in 1932 for legal services in connection
396 with the 1921 income tax controversy, as to which I have just testified, that is, so much of those services as were rendered in 1931 by Mr. Stearns as a member of the firm of Duer, Strong & Whitehead, and had nothing to do with the services rendered by Special Counsel.

Copies of the petition and amended answer on an appeal to the Board of Tax Appeals involving taxpayer's 1921 income taxes were identified by Mr. Hawkins and admitted in evidence as Petitioner's Exhibits Nos. 6 and 7 respectively.

Statement of Evidence.

397

A copy of the petition to the Board of Tax Appeals filed by taxpayer with respect to a deficiency asserted by the Commissioner for 1929 income taxes was identified by Mr. Hawkins and admitted in evidence as Petitioner's Exhibit No. 8.

Dated, October 20, 1939.

ORWILL V. W. HAWKINS,
Attorney for Petitioner on Review,
Office & Post Office Address,
15 Broad Street,
Borough of Manhattan,
New York City, N. Y.

398

IT IS HEREBY STIPULATED AND AGREED by the undersigned that the foregoing statement of evidence and the exhibits referred to therein contain, in narrative form, all the evidence material to the assignments of error filed by petitioner on review with respect to Docket Nos. 80052 and 85961; and it is consented that the same including said Exhibits be settled by a member of the Board of Tax Appeals as the statement of evidence in said proceedings. Said Exhibits, to wit: Petitioner's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, and 8 shall be deemed to be a part of the foregoing Statement of Evidence and shall be printed in the record as a part of the Statement of Evidence.

399

Dated, October 26, 1939.

ORWILL V. W. HAWKINS,
Attorney for Petitioner on Review.

J. P. WENCHEL
Chief Counsel, Bureau of Internal Revenue.

Approved and ordered filed
this 14th day of Nov. 1939
(signed) R. L. DISNEY
Member

400

Petitioner's Exhibit 1.

All terminations of leases to be noted on minutes, three (3) months before expirations.

All new leases and renewals to be noted on the minutes as soon as closed.

Important offers under consideration for leasing property to be noted on minutes.

Petitioner's Exhibit 2.

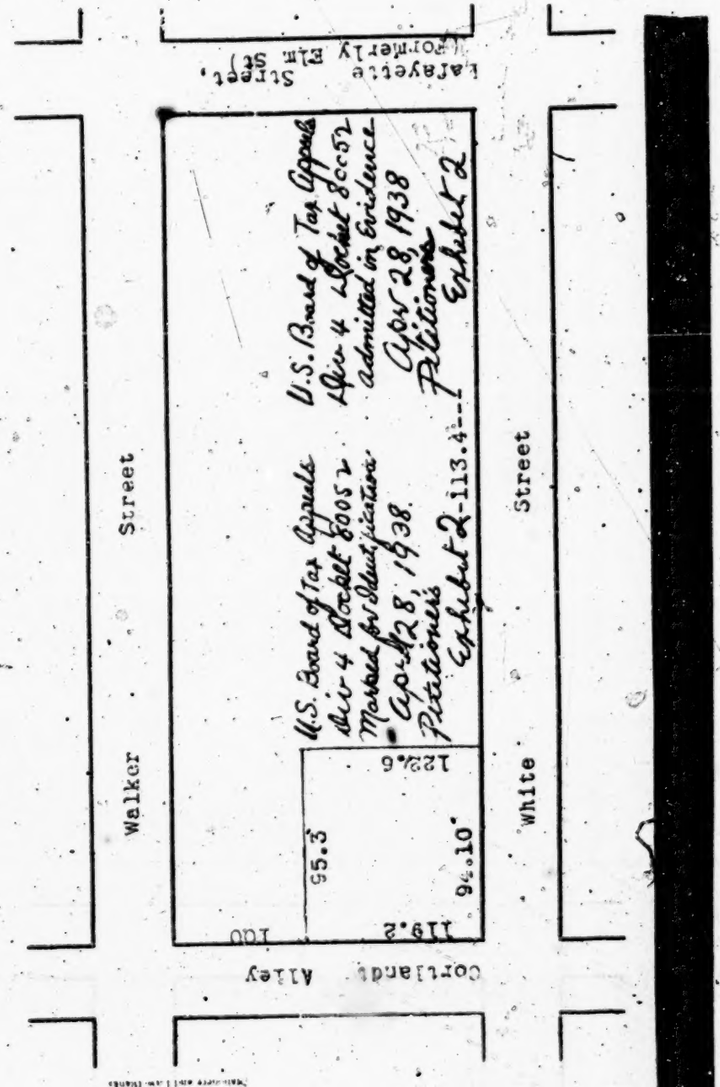
401

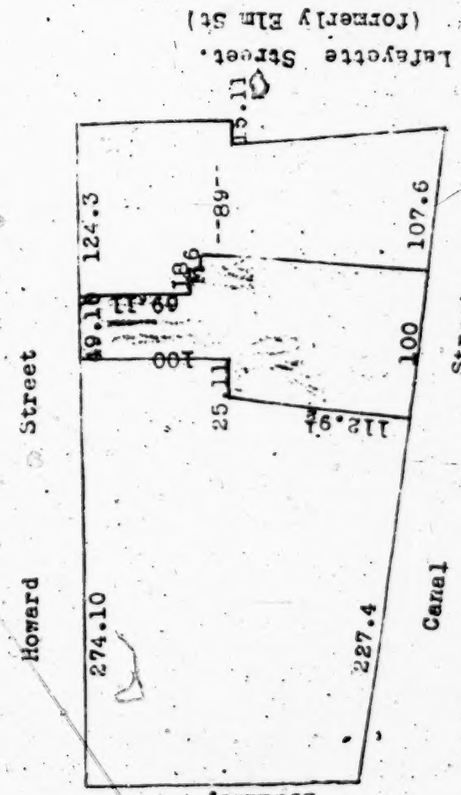
(Mounted on following pages)

402

80-86 White Street
6 Story Building
Erected by Eugene Higgins
1932 Assessment—Land ..... $126,000.
Building ..... 79,000.
Total ..... $205,000.

261-267 Canal Street
6 Story Building
Erected by Eugene Higgins
1932 Assessment—Land ..... $195,000.
Building ..... 145,000.
Total ..... $340,000.





5 East 20th Street
3 Story Building
Erected by Eugene Higgins

1932 Assessment—Land	$32,000.
Building	4,000.
Total	$36,000.

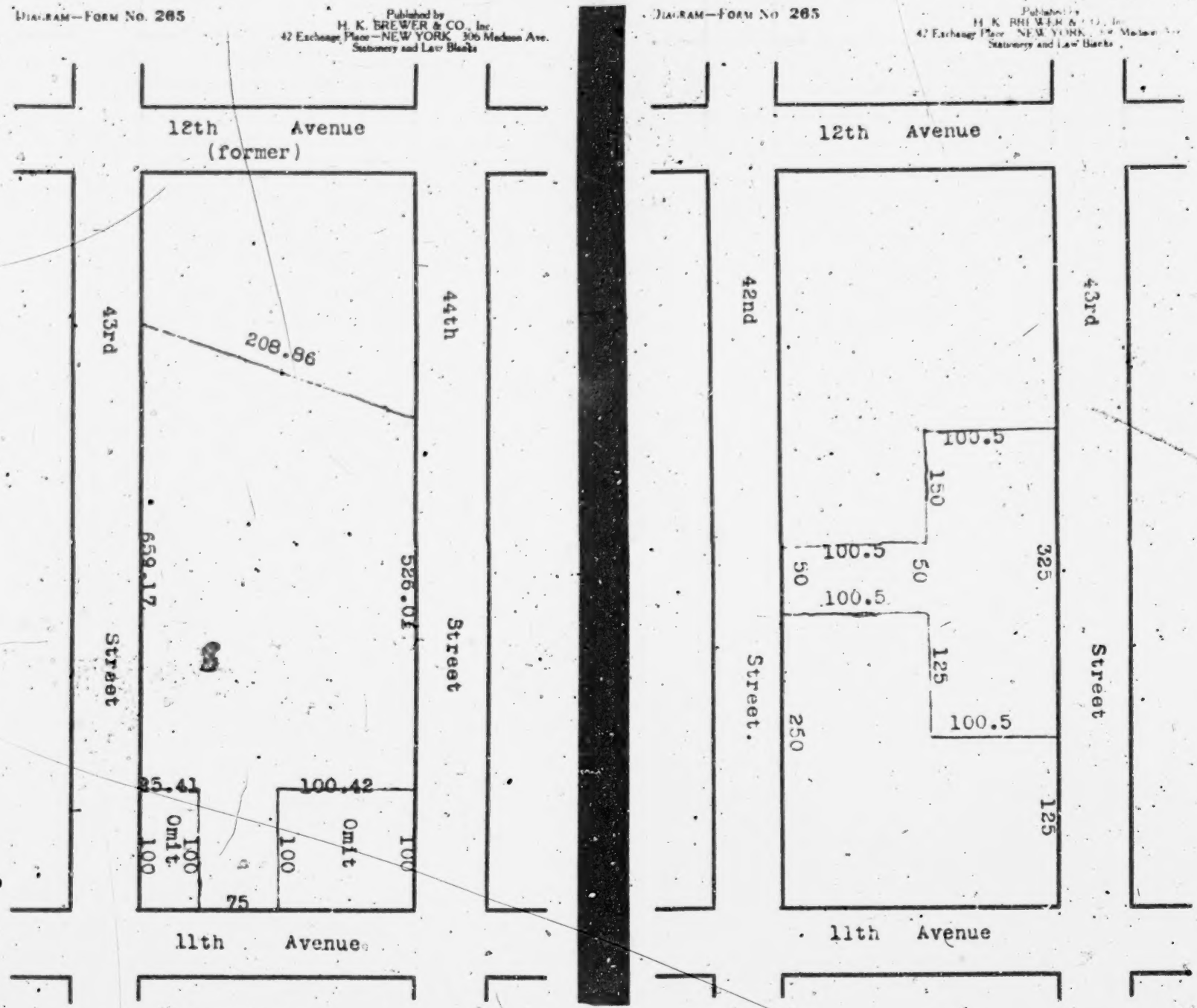
137 Fifth Avenue
12 Story Building
Erected by Eugene Higgins

1932 Assessment—Land	$105,000.
Building	110,000.
Total	$215,000.

West 42nd—43rd Streets
Various Story Buildings
Erected by Eugene Higgins

1932 Assessment—Land	$292,000.
Building	111,000.
Total	$403,000.

Diagram—Form No. 265



West 43—44th Streets
Various Story Buildings
Erected by Eugene Higgins

1932 Assessment—Land ..... $ 925,000.
Building ..... 100,000.

Total ..... $1,025,000.

West 42ND—43rd Streets
Various Story Buildings
Erected by Eugene Higgins

1932 Assessment—Land ..... $292,000.
Building ..... 111,000.

Total ..... $403,000.

BROADWAY AND 70TH STREET
4½ Story Building
Erected by Eugene Higgins

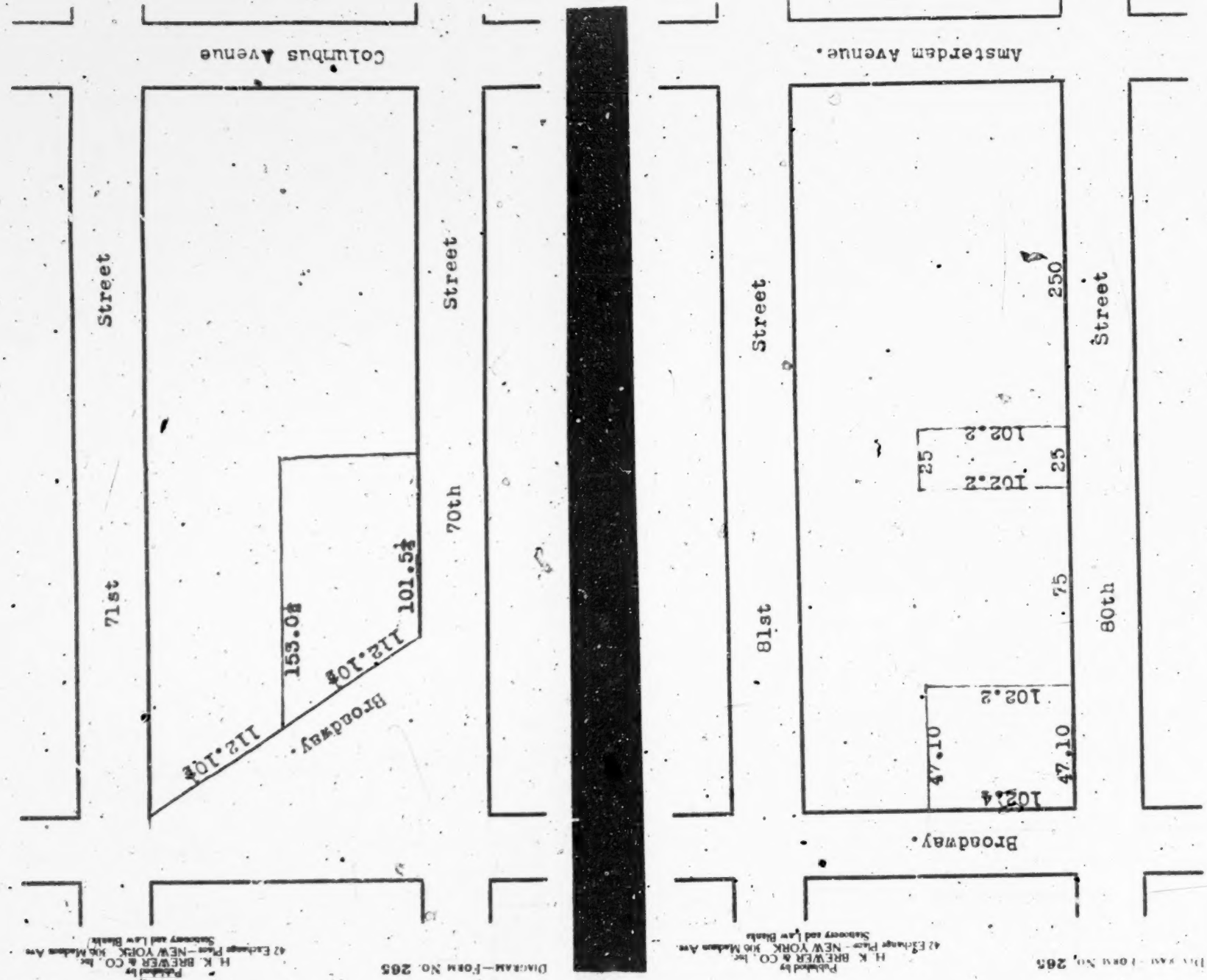
1932 Assessment—Land	$810,000.
Building	110,000.
Total	$920,000

217 WEST 80TH STREET
3 Story Building
Erected by Tenant

1932 Assessment—Land	$30,000
Building	16,000
	$46,000

BROADWAY & 80TH STREET
10 Story Building
Erected by Tenant

1932 Assessment—Land	$350,000.
Building	135,000
Total	$485,000



Published by
H. K. BREWER & CO., Inc.
42 Exchange Place—NEW YORK 306 Madison Ave.
Stationery and Law Blanks

DIAGRAM—FORM NO. 265

2503-2509 Broadway
1 Story Building
Erected by Tenant

1932 Assessment—Land	$315,000.
Building	9,000.
Total	$324,000

H. K. BREWER & CO., Inc.
42 Exchange Place — NEW YORK — 306 Madison Ave
Surveyors and Law Blocks

Diagram—Form No. 265

Broadway & 94th Street
Various Story Buildings
Erected by Tenant

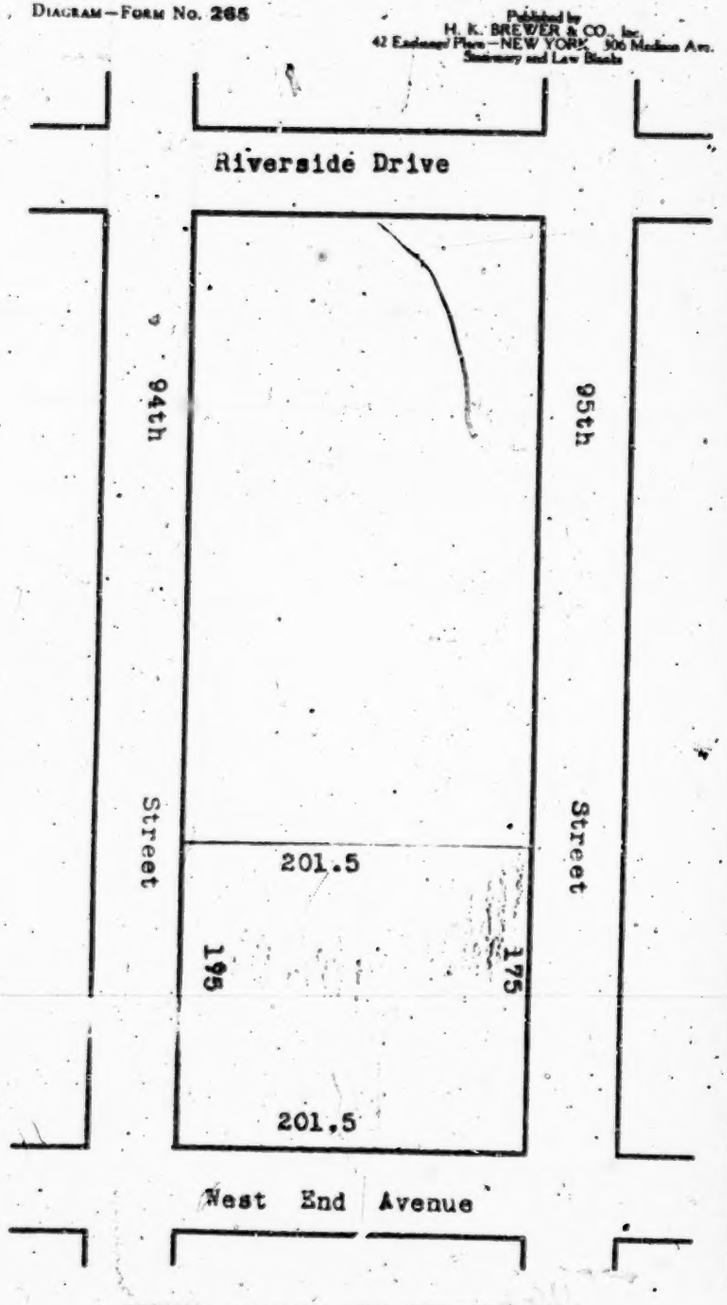
1932 Assessment—Land	$735,000.
Building	35,000.
Total	$770,000.

H. K. BREWER & CO., Inc.
42 Exchange Place — NEW YORK — 306 Madison Ave
Surveyors and Law Blocks

Diagram—Form No. 265

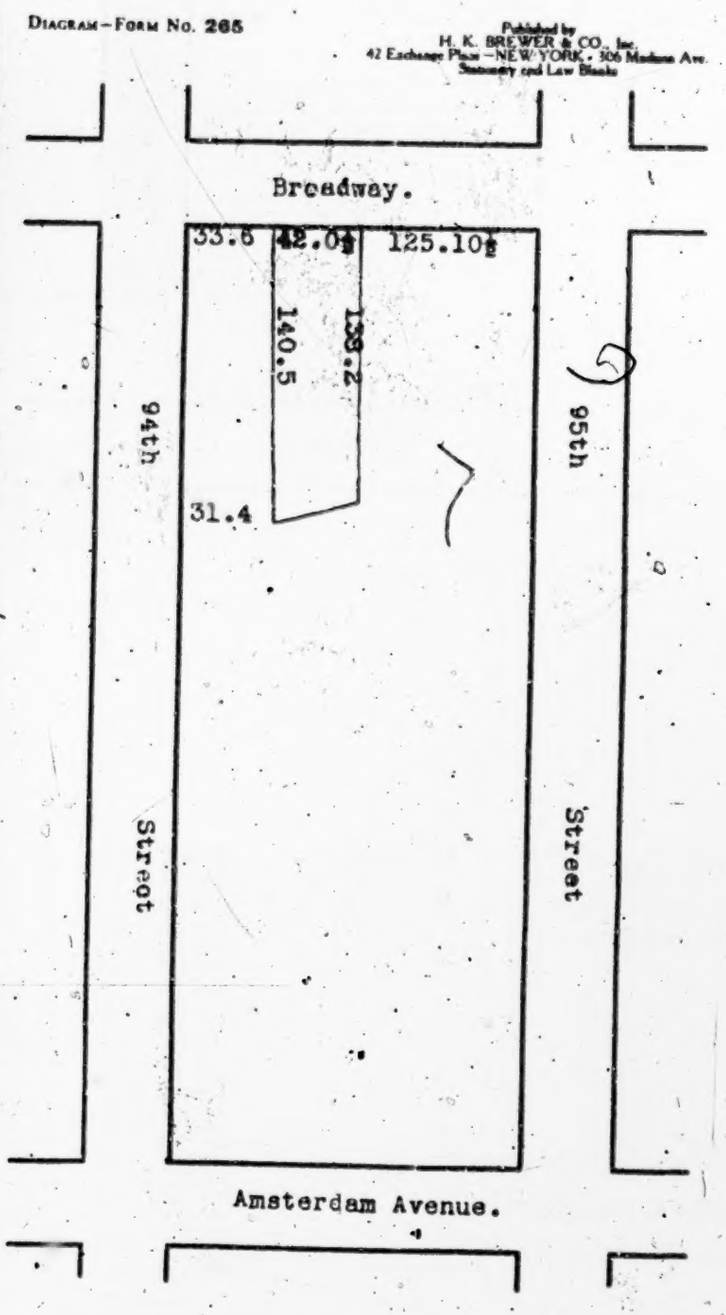
DIAGRAM—FORM No. 265

Published by
H. K. BREWER & CO., Inc.
42 Exchange Place—NEW YORK—306 Madison Ave.
Stationery and Law Blanks



DIAGRAM—FORM No. 265

Published by
H. K. BREWER & CO., Inc.
42 Exchange Place—NEW YORK—306 Madison Ave.
Stationery and Law Blanks



West End Ave. & 95th Street
15 Story Building
Erected by Tenant

1932 Assessment—Land	$ 390,000.
Building	1,810,000.
Total	$2,200,000.

West End Avenue—95th-96th Streets
Vacant Land

1932 Assessment—Land	$588,000.

95th Street Near Riverside Drive
Vacant Land

1932 Assessment—Land	$4,000.

Riverside Drive & 96th Street
Vacant Land

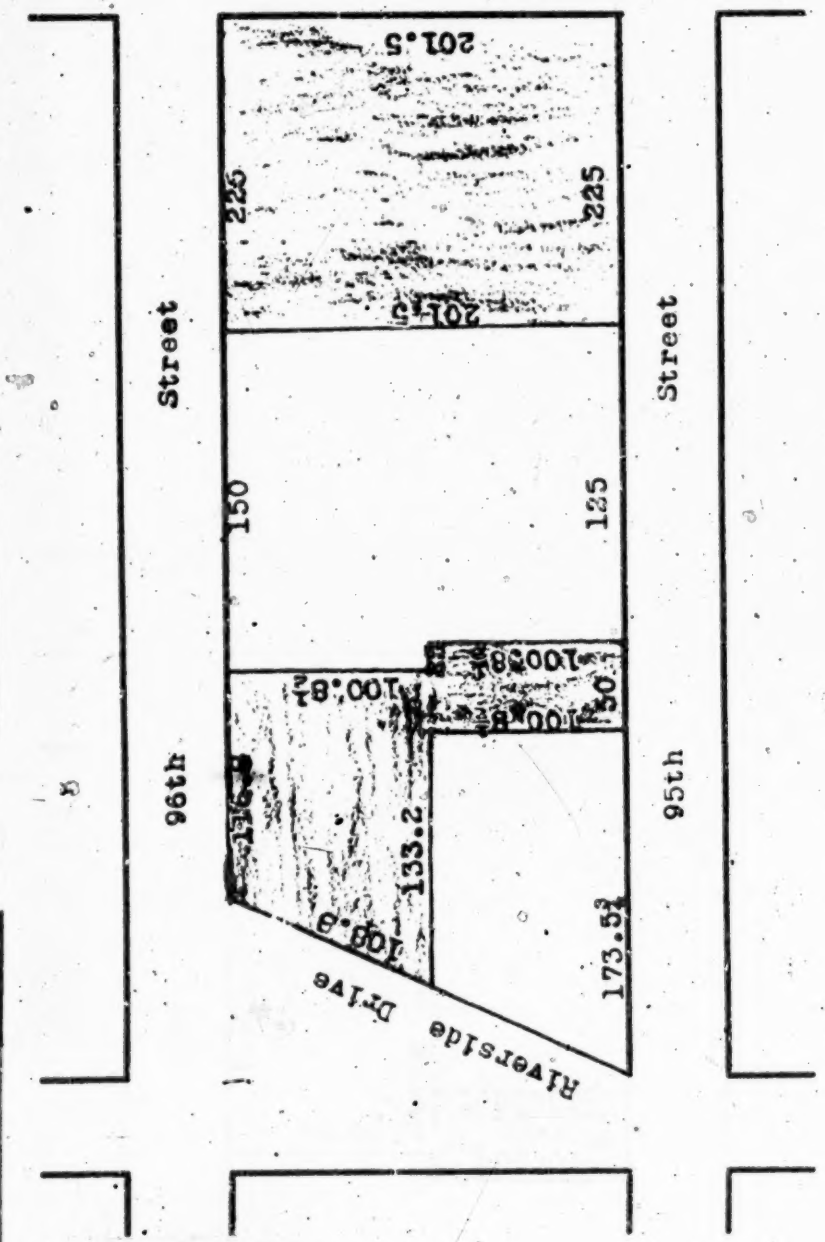
1932 Assessment—Land	$168,000

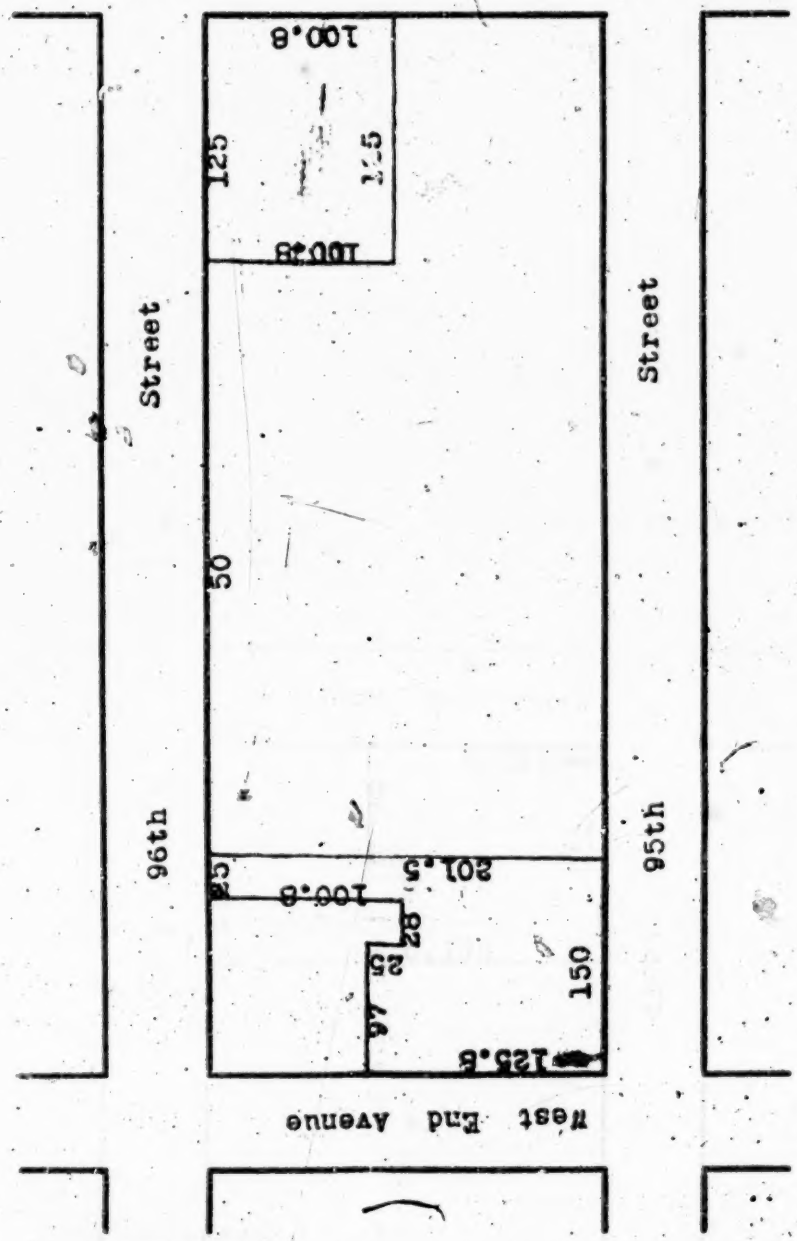
268 West 96th Street
2 Story Building
Erected by Tenant

1932 Assessment—Land	$40,000.
Building	6,000.
Total	$46,000.

Broadway & 96th Street
2 Story Building
Erected by Tenant

1932 Assessment—Land	$695,000.
Building	10,000.
Total	$705,000.





Diagram—Form No. 265
Published by H. K. Brewer & Co., Inc. 42 Eldridge Place—New York 306 Madison Ave. Stationery and Law Blanks

Diagram—Form No. 265
Published by H. K. Brewer & Co., Inc. 42 Eldridge Place—New York 306 Madison Ave. Stationery and Law Blanks

BROADWAY & 95TH STREET
2 Story Building
Erected by Tenant

1932 Assessment—Land	.....	$755,000
Building	.....	20,000.
Total	.....	$775,000.

DIAGRAM—FORM No. 285

102ND STREET & AMSTERDAM AVE.
2 Story Building
Erected by Tenant

1932 Assessment—Land	.....	$ 79,000.
Building	.....	31,000.
Total	.....	$110,000.

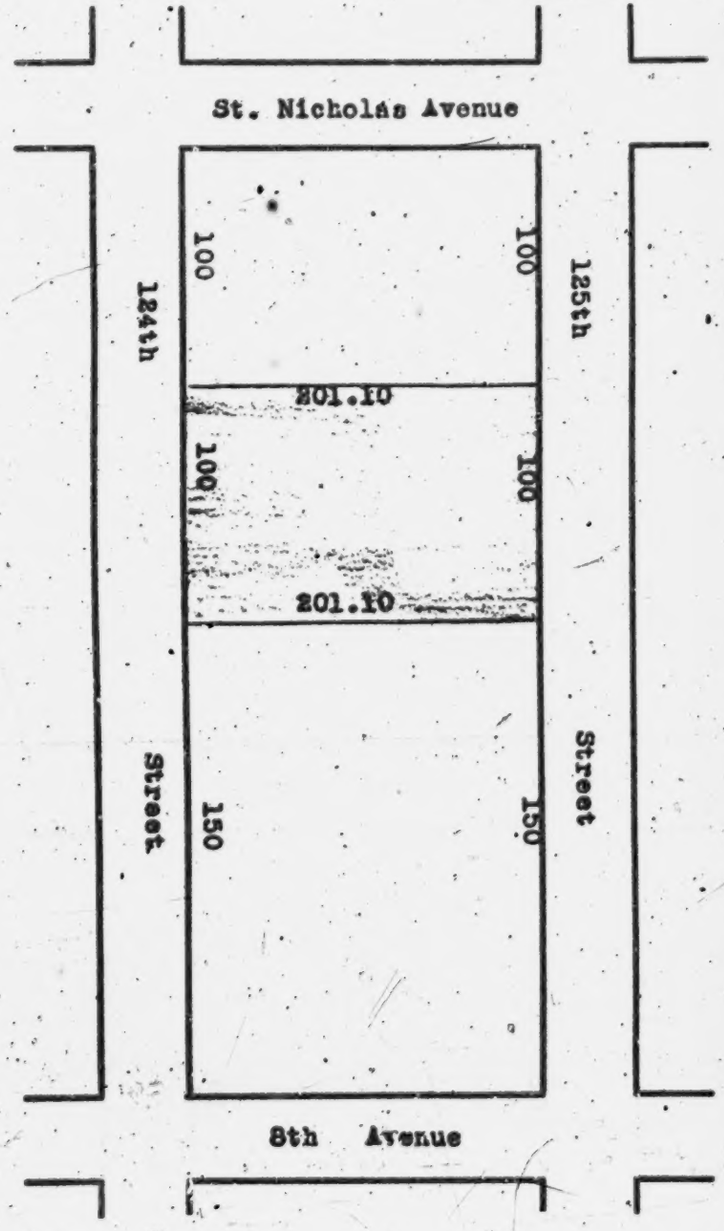
DIAGRAM—FORM No. 285

125th Street Near 8th Avenue
124th Street Near 8th Avenue
3 Story Buildings on 125th St.
Erected by Tenant
3 Story Buildings on 124th St.
Erected by Eugene Higgins

1932 Assessment—Land	$300,000.
Building	50,000.
Total	$350,000.

Diagram—Form No. 265

Published by H. K. BREWER & CO., Inc. 42 Exchange Place—NEW YORK 306 Madison Ave. Stationery and Law Blanks

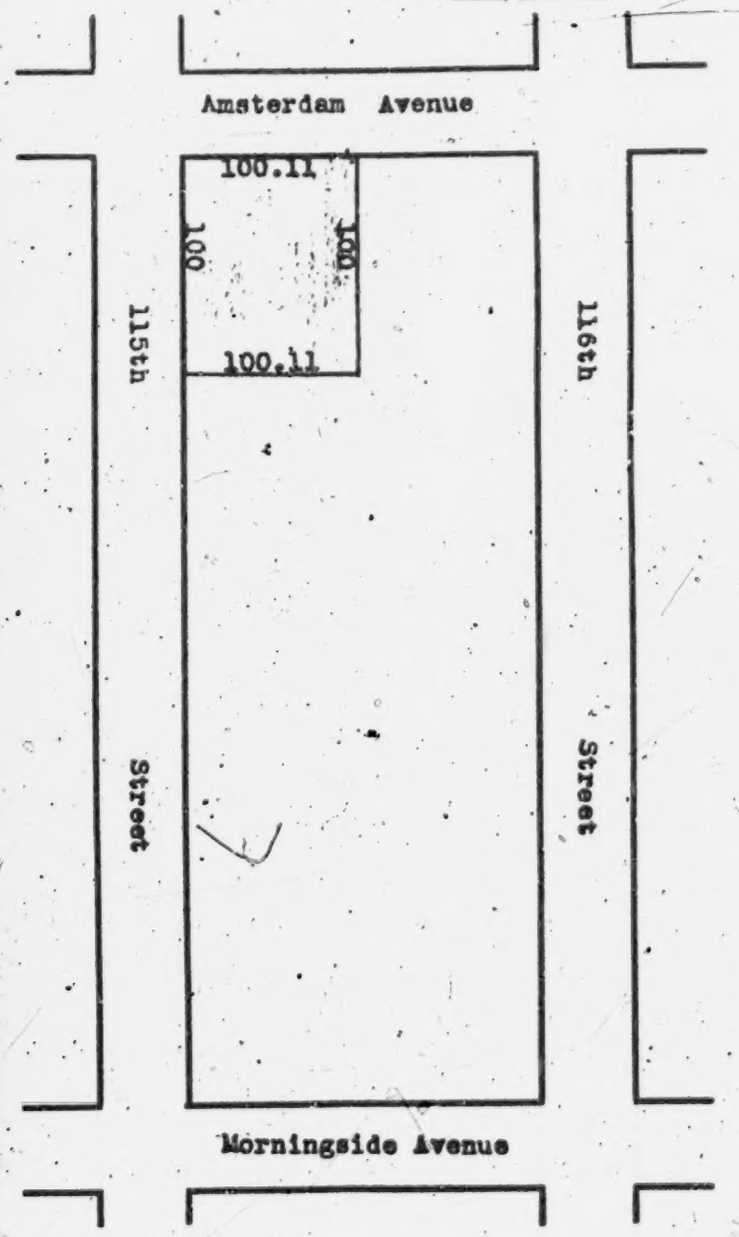


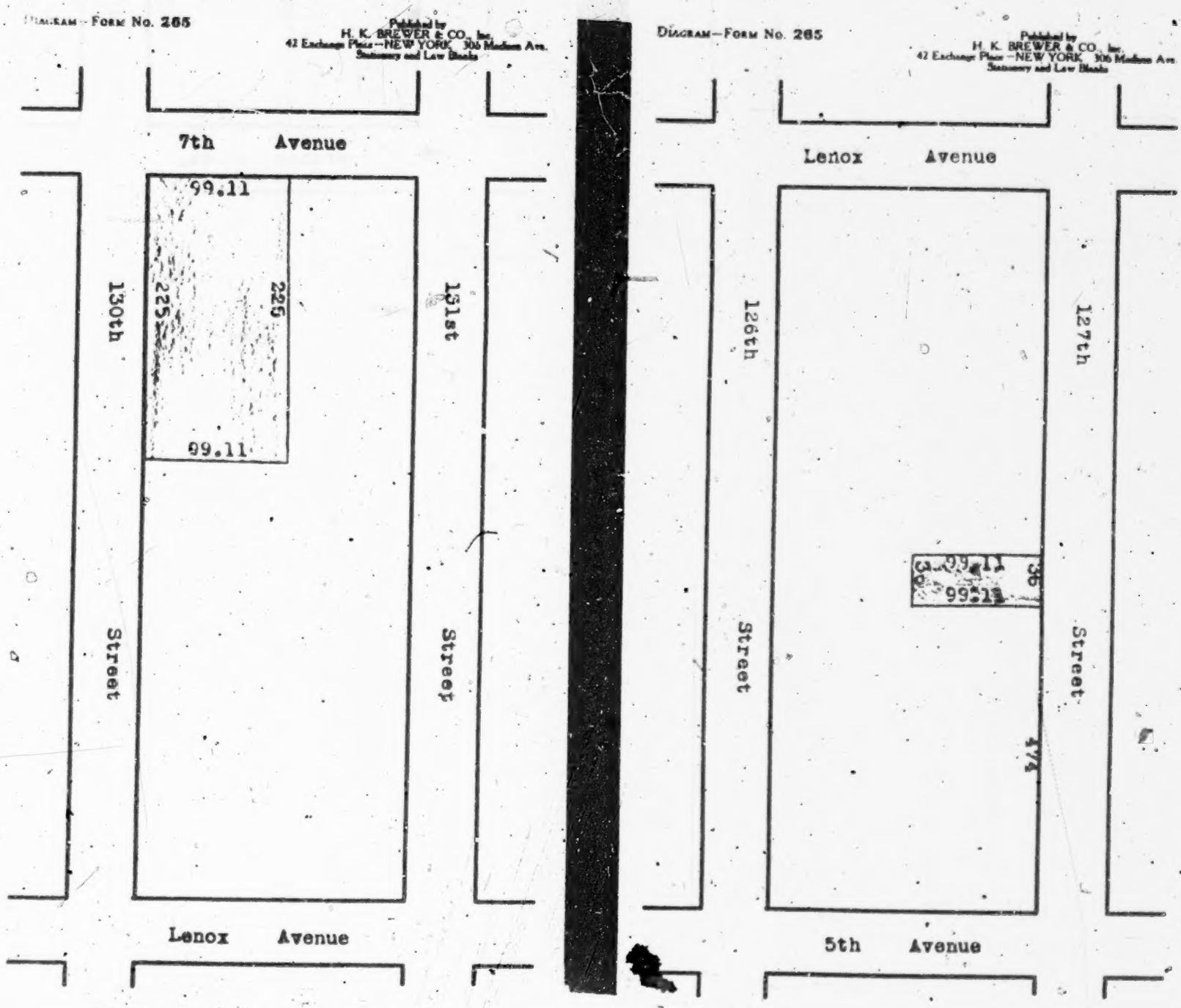
115th Street & Amsterdam Avenue
2 Story Building
Erected by Tenant

1932 Assessment—Land	$244,000.
Building	17,000.
Total	$261,000.

Diagram—Form No. 265

Published by H. K. BREWER & CO., Inc. 42 Exchange Place—NEW YORK 306 Madison Ave. Stationery and Law Blanks





Total $182,000

Land $143,000
Buildings 39,000

Assessment—Land $16,000
Buildings 4,000

Total $20,000

South Side of West 134th Street
Swimming Pool
Erected by Tenant

1932 Assessment—Land	$165,000.
Pool	110,000.
Total	$275,000.

Broadway and 134th Street
Vacant Land
Assessment—Land $47,000.

North Side of West 134th St.
Garage
Erected by Tenant

1932 Assessment—Land	$130,000.
Building	120,000.
Total	$250,000.

Diagram—Form No. 265

Diagram—Form No. 265

436

Petitioner's Exhibit 3.

EUGENE HIGGINS U. S. INCOME TAX RETURNS 1932-1933

Bonds purchased in 1932:	Bond	Par Amount	%	Due
	Boston	$75,000.00	4%	11/1/73
	Boston	$50,000.00	4%	9/1/80/50
	Boston	$50,000.00	4¼	11/1/1974
	Massachusetts	$70,000.00	4	1/1/58
	Massachusetts	$30,000.00	4	1/1/59
	State of New York	$ 5,000.00	4	7/1/60
	State of New York	$61,000.00	4¼	3/1/65
	State of New York	$85,000.00	4½	1/1/64
437	State of New York	$10,000.00	4½	9/1/63
	State of New York	$ 7,000.00	4½	9/1/63
	State of New York	$ 6,000.00	4¼	3/1/65
	State of New York	$32,000.00	4½	9/1/63
	State of New York	$ 8,000.00	4¼	1/1/65
	Boston	$60,000.00	4	6/1/48
	Boston	$20,000.00	4	7/1/59
	Boston	$30,000.00	4½	5/1/71
	Boston	$20,000.00	4	1/1/58
	Boston	$20,000.00	4	7/1/50
	Boston	$20,000.00	4	7/1/58
	Boston	$ 5,000.00	4	6/1/48
	Boston	$10,000.00	4	7/1/59
	Boston	$ 1,000.00	4	6/1/48
Bonds purchased in 1933:				
	U. S. of America	$100,000.00	3½	1932/47
438	"	2,000.00	3½	1932/47
	"	1,000.00	3½	1932/47
	"	1,000.00	3½	1932/47
	"	25,000.00	3½	1932/47
	"	215,000.00	3½	1932/47
	"	50,000.00	3½	1932/47
	"	31,000.00	3½	1932/47
	"	75,000.00	3½	1932/47
	"	225,000.00	3½	1932/47
	"	25,000.00	3½	1932/47
	"	25,000.00	3½	1932/47
	"	50,000.00	3½	1932/47
	"	50,000.00	3½	1932/47
	"	50,000.00	3½	1932/47

Petitioner's Exhibit 4.

439

BONDS SOLD

Bonds	Amount	Date Sold
Chesapeake & Ohio Gen. Mtge. 4½% 1992	$165,000.	1921
West Shore Railroad Co. 4% 2361	$221,500.	1921
New York Central 3½% 1998	$200,000.	1921
Union Pacific 4% 1947	$250,000.	1921
Chicago & Northwestern 3½% 1987	$200,000.	1921
Northern Pacific 4% 1997	$500,000.	1921
Illinois Central 3½% 1953	$200,000.	1921
City of New York 3½% 1949	$ 43,000.	1921
Chicago & Alton 3% 1949	$ 50,000.	1921
City of New York 4% 1936	$200,000.	1921
Chicago, Burlington & Quincy 4% 1949	$200,000.	1921
City of New York 4% 1955	$ 59,000.	1921
City of New York 4% 1956	$113,000.	1921
City of New York 4% 1956	$128,000.	1922
City of New York 4¼% 1962	$847,000.	1921
City of New York 4¼% 1960	$500,000.	1921
City of New York 4¼% 1964	$400,000.	1921
City of New York 4¼% 1966	$300,000.	1921

440

441

442

Petitioner's Exhibit 5.

FRENCH TELEGRAPH CABLE COMPANY
MD . . . FA 5 ANTIBES 25 14 1045

LCD GLEN NY FEB 14 1930

PLEASE CABLE ME WHEN THOSE DELEWARE BONDS ARE ACTUALLY REDEEMED AND PAID FOR WHEN I WILL INSTRUCT TRISTRAM CONCERNING INVESTING PROCEED

HIMGINS

EUGENE HIGGINS
443 50 UNION SQUARE

Delivered from
65 Fifth Avenue
For Reply phone
ALgonquin 4135

A

FRENCH CABLE COMPANY

444 1931 MAR 9 AM 8 10
MAR 9 - 1931

CB . . . L36 ANTIBES 56

LCD EDWARD SHELDON CARE TRISTAN NEW YORK . . . BEFORE I WRITE REQUESTING YOU TO INVEST IN USUAL TAX EXEMPT BONDS PLEASE CABLE WETHER MELLONS PROPOSED ISSUE EIGHT MILLONS UNITED STATES BONDS FREE FROM INCOME TAXES REPORTED IN FINANCIAL CHRONICAL JANUARY SEVEN-

Petitioner's Exhibit 5.

445

TEENTH WILL SHORTLY BE ISSUED ALSO WHETHER YOU SUGGEST ANY OTHER THAN MY PREVIOUS BONDS REGARDS

EUGENE HIGGINS

B.

S.Y. THALASSA ANTIBES Harbor, March 10th, 1931.

446

Edward Sheldon, Esq.,
Chairman of the Board of Directors,
United States Trust Co of New York,
45 - 47 Wall Street,
New York City. (U. S. A.).

Dear Mr. Sheldon,

Will you buy me from my drawing account, within reasonable time from the receipt of this letter and at favorable prices, Six Hundred and Fifty Thousand Dollars ($650,000.—) par value, long term, tax and surtax exempt, registered Bonds, at your discretion but among the following seven tax and surtax exempt securities:— 447

1° — City of New York,
2° — State of New York,
3° — City of Newark,
4° — State of New Jersey,
5° — City of Boston,
6° — State of Michigan,
7° — City of Philadelphia.

I will ask you to buy, among above, only such Bonds as can be delivered within a short time.

448 *Petitioner's Exhibit 5.*

When bought, please have these securities at once registered in my name and delivered against receipt to my representative at my office, No. 50 Union Square East, New York City.

(over) . . .C

Mr. E. Sheldon, March 10, 1931. Page II

If you have reason to suggest some other securities of the highest standard, also tax and surtax exempt as well as registerable, which you consider could be advantage-
449 ously included in above list of seven, will you please cable me your selection and advice thereon.

Kindly cable me receipt of this letter.

With kind regards

Very sincerely yours,

EUGENE HIGGINS.

Delivered
11 AM
Mar 25 1931

---

450 7, PLACE D'IENA, XVI PARIS, April 28th, 1931

Dear Mr. Sheldon,

My attention has recently been called to some American Bonds, tax and sur-tax exempt, such as:—

COMMONWEALTH OF KENTUCKY

Bridge Revenue 4½% Bonds
due July 1st, 1945,
(Payable from Bridge Revenues)
at 100% and accrued interest.

And

Petitioner's Exhibit 5,

"FEDERAL LAND BANK BONDS"
Tax and sur-tax exempt,

interest from 4 to 4¾%, varying according to redemption and now, I believe, selling under par.

May I ask you to kindly advise me whether you think these two Bonds, and others of their class, worthy of serious consideration?

Thanking you in advance, believe me, with kind regards

Yours very sincerely,

EUGENE HIGGINS.

D

May 7, 1931.

My dear Mr. Higgins:—

Today I have received your letter of April 28th.

Neither the Commonwealth of Kentucky Bridge Revenue 4½% Bonds, due July 1, 1945, nor any of the Federal Land Bank Bonds seem to us here to meet the standard of quality which you have heretofore laid down for your investments. The Kentucky bonds do not seem to be the full direct and general obligations of the State of Kentucky and the Federal Land Bank bonds are not properly classified as long-term investments as they are all callable at an early date.

Beyond the list of states and cities which you have heretofore authorized, there seems to be practically nothing currently available which we should be disposed to

Petitioner's Exhibit 5.

454 recommend to you. Trusting that I have fully answered your inquiry, believe me,

Yours sincerely,

EDWARD W. SHELDON

Eugene Higgins, Esq.,
7 Place d' Iena,
Paris, France.

E

455

---

7 Place D'Iena, XVI PARIS, September 30th, 1931.
Edward Sheldon, Esq.,
Chairman of the Board of Directors,
United States Trust Co of New York,
45-47 Wall Street,
New York City. (U. S. A.).

Dear Mr. Sheldon,

456 Will you buy me from my drawing account, within reasonable time from the receipt of this letter and at favorable prices, Four Hundred Thousand Dollars—($400,000.)—par value, long term, tax and surtax exempt, registered Bonds, at your discretion but among the following seven tax and surtax exempt securities:—

1° — City of New York,
2° — State of New York,
3° — City of Newark,
4° — State of New Jersey,
5° — City of Boston,
6° — State of Michigan,
7° — City of Philadelphia.

Petitioner's Exhibit 5.

457

I will ask you to buy, among above, only such Bonds as can be delivered within a short time.

When bought, please have these securities at once registered in my name and delivered against receipt to my representative at my office, No. 50 Union Square East, New York City.

May I ask you to kindly cable me should you wish to advise other more advantage, but thoroughly safe, investments.

Please cable me receipt of this letter.

With kind regards,

458

Very sincerely yours,

EUGENE HIGGINS.

F

POSTAL TELEGRAPH

850 Broadway
Tel. ALgonquin 4-1362

NA 11 24 CABLE VIA FRENCH

ANTIBES NFT JAN 27 1932 459

LCD GLEN

NEWYORK (EUGENE HIGGINS 50 UNION SQUARE) HAVE CABLED INTRUCTING TRISTRAM BUY TWOHUNDRED SEVENTYFIVE THOUSAND DOLLARS BONDS STRICTLY FOLLOWING INSTRUCTIONS MY LETTER DATED SEPTEMBER THIRTIETH NINETEEN THIRTYONE

HIGGINS.

904A

G

460 *Petitioner's Exhibit 5.*

Refer to
A.H. Erb
A.H.E.

S.Y. THALASSA

Port d'Antibes, January 27th, 1932.

The United States Trust Co.
of New York,
45 - 47 Wall Street,
New York City. (U. S. A.).

461 Dear Sirs:

I have this morning sent you the following telegram, which explains itself:—

"PLEASE BUY FROM MY DRAWING ACCOUNT TWOHUNDRED SEVENTYFIVE THOUSAND DOLLARS PAR VALUE LONG TERM REGISTERABLE TAX SURTAX EXEMPT BONDS AMONG THOSE SAME SECURITIES AS PER MY LETTER TO YOU DATED SEPTEMBER THIRTIETH NINETEEN THIRTYONE AND CONFORMING IN ALL RESPECTS TO INSTRUCTIONS CONTAINED THEREIN KINDLY CABLE ACKNOWLEDGMENT."

462

Yours sincerely,

EUGENE HIGGINS

Received
11:30 PM
Feb 5, 1932

H

Petitioner's Exhibit 5.

463

FRENCH CABLE COMPANY

D 89 JAN 27 1932
E 59 R ANTIBES 50 1210
TRISTAM NYK
PLEASE BUY FROM MY DRAWING ACCOUNT TWO-HUNDRED SEVENTYFIVE THOUSAND DOLLARS PAR VALUE LONG TERM REGISTERABLE TAX SURTAX EXEMPT BONDS AMONG THOSE SAME SECURITIES AS PER MY LETTER TO YOU DATED SEPTEMBER THIRTIETH NINETEEN THIRTYONE AND CONFORMING IN ALL RESPECTS TO INSTRUCTIONS CONTAINED THEREIN KINDLY CABLE ACKNOWLEDGMENT

464

EUGENE HIGGINS

I

7, Place D'Iena, XVI PARIS, June 22nd, 1932.

Dear Mr. Sheldon,

Most Americans over here are very greatly perturbed and, in fact, really frightened at the tragic and sinister turn of events in our Country and see nothing but dire calamity and collapse for the future.

465

The views expressed by G. Selfridge in enclosed clipping seem to voice their thoughts.

They point to the ever increasing lawlessness, discontent and disrespect for all authority; to the greatly increasing general drunkenness and dope-taking especially among the young of both sexes who, it appears, are also much in evidence by their brazen immorality.

466 *Petitioner's Exhibit 5.*

And finally they particularly point to the utter collapse of the Stock Market which has recorded nothing but increasing slumps for the last two years.

When such first class gilt-edged stocks as New York Central Railroad, Pennsylvania Railroad, Delaware Lackawanna & Western Railroad, not mentioning many others, are compelled to pass their dividends and are to-day respectively selling at $12.—, $8½., $10.—, it is indeed time to acknowledge that something or some things are most radically wrong with America and forces one to look
467 toward the Future with grave anxiety.

The above, I acknowledge, is very pessimistic, but from the many and general tales of woe and distress I continually hear from all of my compatriots who have recently arrived from America my pessimistic views seem warranted by their conversations.

As you are in a position to know and to learn as to what the facts actually are, may I ask you confidentially, to kindly inform me whether there are some rays of sunshine discoverable among so many black and stormy clouds.

468 If you have any intention of visiting Paris or France this Summer or Autumn, will you please inform me of your plans beforehand so that I can arrange to see you.

With kindest regards

Very sincerely yours,

EUGENE HIGGINS

J

Petitioner's Exhibit 5:

469

7 Place D'Iena, XVI

PARIS, July 6th, 1932.
Recd Jul 14 1932
10.45 AM AHE

Edward Sheldon, Esq.,
Chairman of the Board of Directors,
United States Trust Co of New York,
45 - 47 Wall Street,
New York City. ~~(U.~~ S. A.).

Dear Mr. Sheldon,

470

Will you please buy me from my drawing account, within reasonable time from the receipt of this letter and at favorable prices, Four Hundred Thousand Dollars— ($400,000.-)— par value, long term, tax and surtax exempt, registered Bonds, at your discretion but among the following eight tax and surtax exempt securities:—

1° — State of New York,
2° — City of New York,
3° — City of Newark,
4° — State of New Jersey,
5° — State of Michigan,
6° — City of Philadelphia,
7° — City of Boston,
8° — State of Massachusetts.

471

I will ask you to buy, among above, only such Bonds as can be delivered within a short time.

When bought, please have these securities at once registered in my name and delivered against receipt to my representative at my office, No. 50 Union Square East, New York City.

472 *Petitioner's Exhibit 5.*

May I ask you to kindly cable me should you wish to advise other more advantageous, but thoroughly safe, investments.

Please cable me receipt of this letter.

With kind regards,

Sincerely yours,

EUGENE HIGGINS

K

473

July 15, 1932.

My dear Mr. Higgins:—

I have received and carefully considered your letter of June 22nd.

Financial conditions here have of course been most disturbing. Perhaps the depression has not yet run its full course. The reports of corporations to be issued during the coming six months will probably continue unfavorable. It seems, however, to be the best opinion here that the extreme views so frequently expressed by
474 Europeans, of which the extract you enclose of Mr. Gordon Selfridge is an example, are unduly apprehensive. Several of our difficult situations have been satisfactorily handled during the past few months, and it is believed by many of our experts that before the end of the year a substantial change for the better will take place here. Ours is still a great country and we should in time come out of the present depression.

While I should greatly enjoy a European trip this summer or autumn, I do not expect to be able to get away from New York. The buildings which the New York Hos-

475

pital has been erecting on the East River between 68th and 71st Streets for the New York Hospital-Cornell Medical College Association are about finished and we expect to move into them between now and the first of September. Questions come up for decision almost daily and I feel that I should be here to help in solving them.

Yours sincerely,

EDWARD W. SHELDON

Eugene Higgins, Esq.,
7 Place d'Iena,
Paris, France.

476

L

---

7 Place D'Iena XVI PARIS, July 25th, 1932.

Dear Mr. Sheldon,

Many thanks for your letter dated July 15th, which I have read with attention.

The question which especially interests me is whether 477
Delaware, Lackawanna & Western RR. stock, of which I own 41,058 shares, will, in the near future, return more or less to its old time value and pay its old time dividends.

It recently struck me that the present situation of the American railroad companies might be compared to that of the American canal companies some eighty years ago.

In the United States, canal building was carried on with great activity from the beginning of the Nineteenth Century until about 1837 when the advent of railways

478 checked their development and they were practically abandoned for the railroads which took their place.

It appears that before the coming of railroads, canal stocks were highly esteemed and were speculated in much in the same way as railroads in their prime. Since canals were superseded by railroads and generally practically went out of existence, what is to prevent railroads from also being superseded by airplanes, automobiles, lorries, etc., etc.,? Should this turn out to be the case, would such stocks as New York Central, Pennsylvania RR., Delaware, Lackawanna & Western RR., be worth more
479 than they are actually selling for,—about $10.-?

The British and Continental Railroads seem to be following, although in a lesser degree, the great decline of the American railways and most of them would have been put in the hands of receivers had not their respective Governments come to the rescue, incorporating in their budgets considerable sums to make up for the large deficits of these companies, while at the same time permitting the same companies to increase by twenty five to fifty per cent their mileage fares for goods and passengers.

Hoping this will find you in your usual good health, believe me with kind regards

480

Sincerely yours,

EUGENE HIGGINS

M

August 11, 1932.

My dear Mr. Higgins:

I have read with much interest your suggestive letter of July 25th with reference to American Railways.

Petitioner's Exhibit 5.

481

It is our feeling here that the railways are essential to the country and will remain so for a long time to come. Their present difficulties are due principally to the great shrinkage in earnings resulting for the widespread business depression. The increase in the use of automobiles and motor trucks has been a minor factor. The railways have reduced their expenses to such an extent that a comparatively small increase in traffic will improve their earnings materially. The railways themselves have been steadily expanding their use of motor trucks and buses. Other methods are being adopted by the railways to restrain the development of trucks as competitors. Airplanes and pipelines are not of importance at the present time as competitors of railways, and their future possibilities seem limited.

482

Coming to the Delaware, Lackawanna & Western Railroad Company, in which you have so large an interest, it is true that earnings on the present basis of traffic will scarcely cover fixed charges for 1932, but no changes in either territory served or commodities carried would prevent a recovery of earning power when a general betterment in business comes. It is expected that the completion of its electrification work will permit of economies not formerly possible, and the recent approval by the Interstate Commerce Commission of the Eastern trunk line merger application permitting the New York Central to acquire the Lackawanna is a favorable development.

483

The general attitude of the Interstate Commerce Commission towards the railways is also significant, and the Reconstruction Finance Corporation is doing everything in its power to sustain them until business revives.

Under all the circumstances it seems to us advisable for you to continue to hold your Lackawanna shares. While, to answer your question, we do not believe that these shares

Petitioner's Exhibit 5.

484 will in the near future return to their old-time value
pay their old-time dividends, we think that any materi
crease in earning power and dividend possibilities is l
to increase the market value of the shares. This valu
already about doubled in the stock market spurt of the
few days. When conditions have still more substan
improved you may be disposed to reduce your large int
in this particular stock.

Trusting that we have covered the points you ha
mind, believe me, with best regards,

485 Yours sincerely,

EDWARD W. SHELDON

Eugene Higgins, Esq.,
7, Place d'Iena, XVI o
Paris, France

N

7, Place D'Iena, XVI PARIS, September 27th,

Dear Mr. Sheldon,

486 Enclose you a clipping from the Commercial and F
cial Chronicle of New York, September 10th, 1932, in w
I have marked a paragraph concerning the new issue of
year obligations of the United States bearing 3¼%
terest and free of all taxes.

May I ask you to kindly inform me at your earliest
venience what these are selling for and whether you app
of them for future investment.

With kind regards

Sincerly yours,

EUGENE HIGGINS

O

Petitioner's Exhibit 5.

October 5, 1932.

My dear Mr. Higgins:

This morning I have your letter of September 27th enclosing a clipping from the Commercial and Financial Chronicle of New York of September 10th, which is returned herewith, in which reference is made to the new issue of five-year obligations of the United States bearing 3¼% interest and "free of all taxes". This issue is now selling at 101 12/32—101 14/32 at which price the return is about 2.92%. These obligations are exempt from all taxation, Federal or State, with the exception of inheritance taxes. We think very highly of them and hold a considerable amount of them in our Capital and Surplus Account. We should approve of them for investment by you in the future if you are satisfied with the low interest return.

Another issue of similar tax free obligations of the United States bearing 3% interest and running for four and one half years is announced to be made on the 15th of October.

Believe me, with kind regards,

Yours sincerely,

EDWARD W. SHELDON
Chairman

Eugene Higgins, Esq.,
7, Place d'Iena,
Paris, France

P
C

Petitioner's Exhibit 5.

FRENCH CABLE COMPANY

850 BROADWAY
TEL. ALGONQUIN 4-1362

NA10 35 CABLE VIA FRENCH

ANTIBES NFT FEB 14 1933

LCD GLEN

NEWYORK (EUGENE HIGGINS 50 UNION SQ EAST)
PLEASE ASK SHELDON IF HE CAN SUGGEST ANY ADVANTAGEOUS CHANGES IN MY LAST INVEST-
MENT LISTS AND WHETHER PRESENT TIME IS NOT PROPITIOUS FOR BUYING ALSO CABLE AMOUNT NOW AVAILABLE FOR INVESTMENT

HIGGINS
903A.

Q

No. 1,578

S.Y. THALASSA Antibes harbor, February 18th, 1933.

Dear Mr. Whitehead,

Received your letter No. 3,025, dated February 7th, 1933.

Enclose you two checks numbered 7,095 and 7,096 for five thousand—($5,000.-)—Dollars each for deposit to my credit in the Garfield Branch of the Chase National Bank.

On February 14th, I cabled you as follows:—

"PLEASE ASK SHELDON IF HE CAN SUGGEST ANY ADVANTAGEOUS CHANGES IN MY LAST

Petitioner's Exhibit 5.

INVESTMENT LISTS AND WHETHER PRESENT TIME IS NOT PROPITIOUS FOR BUYING ALSO CABLE AMOUNT NOW AVAILABLE FOR INVESTMENT."

to which you replied on February 15th:—

"INTERVIEWED SHELDON PERSONALLY stop HE SAYS DOES NOT ADVISE INVESTING AT PRESENT stop DESIRABLE BONDS VERY HIGH stop SHELDON CONSIDERS COMMONWEALTH MASSACHUSETTS CITY BOSTON NEWYORK STATE BEST BONDS stop NO COMMONWEALTH MASSACHUSETTS BONDS AVAILABLE AT PRESENT stop CITY BOSTON YELD ABOUT FOUR PERCENT NEWYORK STATE YELD ABOUT THREE PERCENT stop SHELDON THINKS BETTER WAIT UNTIL CONGRESS CONVENES IN SPRING BEFORE INVESTING stop SHELDON SAYS SHOULD THERE BE LARGE ISSUE UNITED STATES BONDS PRICE STATE AND MUNICIPAL BONDS WOULD COME DOWN stop YOUR BALANCE TRISTRAM FIVEHUNDRED FOURTEEN THOUSAND THREEHUNDRED NINETEEN DOLLARS stop NATIONALCITY SIXTYEIGHT THOUSAND SEVENHUNDRED SIX stop TOTAL FIVEHUNDRED EIGHTY THREE THOUSAND AND TWENTYFIVE stop WE CONSIDER YOU CAN SAFELY INVEST FOURHUNDRED THOUSAND."

Yours sincerely,

E. HIGGINS

R

Petitioner's Exhibit 5.

FRENCH CABLE COMPANY

D 60 Referred to AHE

Mar 29 1933

1933 Mar 29 AM 8 38

PQK5545 FTNME ANTIBES 62 29th 1215

LCD TRISTRAM NEWYORK

PENDING ARRIVAL YOUR LETTER ADVISING INVESTMENTS IF YOU CAN PICK UP AT REASONABLY LOW PRICES ON NEWYORK STOCK EXCHANGE SMALL OR LARGE QUANTITIES UNITED-STATES FIRST LIBERTY REGISTERED THREE AND ONEHALF PERCENT BONDS TAX SURTAX EXEMPT PLEASE BUY SAME FROM MY CURRENT ACCOUNT TOTAL INVESTMENT NOT TO EXCEED FIVEHUNDRED THOUSAND DOLLARS MAILING TODAY LETTER CONFIRMING ABOVE INSTRUCTIONS REGARDS

EUGENE HIGGINS

S

POSTAL TELEGRAPH

NA83 25 CABLE VIA FRENCH

ANTIBES NFT MAR 13 1933

LCD GLEN

NEWYORK (EUGENE HIGGINS 50 UNION SQUARE EAST)

CAN SUCH BONDS AS I USUALLY INVEST IN BE BOUGHT ON NEWYORK STOCK EXCHANGE WITH THE RESULTING CONTROL OF PURCHASE PRICE

HIGGINS

258 P.

T

Petitioner's Exhibit 5.

POSTAL TELEGRAPH

850 Broadway
Tel. Algonquin 4-1362

NA6 53 CABLE VIA FRENCH

ANTIBES MAR 14 1933

LCD GLEN

NEWYORK (EUGENE HIGGINS 50 UNION SQ EAST)

MY ENQUIRY NOT FOR PRESENT BUT FOR FUTURE DO NOT CONSULT TRISTRAM REGARDING THIS QUESTION STOP WHEN I NEXT INVEST WANT TO BE ASSURED NOT PAYING EXTRAVAGANT PRICES STOP UP TO PRESENT COULD FIND NO WAY CHECKING PRICES WHEREAS IF PURCHASES WERE MADE ON STOCK EXCHANGE COULD CHECK PRICES

HIGGINS

831A

U

No. 1,585

S. Y. THALASSA Port d'Antibes, March 13th, 1933

Dear Mr. Whitehead,

Received your letters No. 3,031 of February 28th, and No. 3,032 of March 3rd, 1933.

On March 4th, I received your cable reading as follows:— "EXCHANGE TEMPORARY GLENALDEN BONDS AND DEPOSITED ONEMILLION TWOHUNDRED FORTYFIVE THOUSAND DOLLARS PERMA-

Petitioner's Exhibit 5.

502 NENT BONDS . FULLY REGISTERED IN YOUR STRONG BOX THIS MORNING."

On March 10th, I received from you the following cable:—

YOUR LETTER FEBRUARY TWENTYEIGHT RECEIVED stop SHELDON NOT DOWNTOWN TODAY stop HAD INTERVIEW WITH KEELER OF TRISTRAM stop KEELER SAYS DOES NOT ADVISE INVESTING AT PRESENT stop HE CONSIDERS BONDS STATE MICHIGAN GOOD stop KEELER SAYS GEN-
503 ERAL FEELING BETTER."

and also on the same day:—

WILL YOU KINDLY CABLE TRISTRAM PAY FOR YOU TWENTYSIX THOUSAND SIXHUNDRED FIFTYFOUR DOLLARS FIFTYEIGHT CENTS INCOME TAX DUE MARCH FIFTEEN

to which I replied:—

INSTRUCTED TRISTRAM SEND YOU THAT INCOME TAX CHECK.

Enclose you one check numbered 7103 for Twenty thou-
504 sand—($20,000.-)—Dollars for deposit to my credit in the United States Trust Company of New York.

Will you please inform me what the Authorities will probably do regarding Charles Mitchell, late chairman of the National City Bank of New York and also regarding its Directors.

What is the general opinion concerning the affairs of the Guaranty Trust Company: are they more or less in the same boat as Mitchell and his crew?

Petitioner's Exhibit 5.

505

On receipt of this letter will you please call upon Mr. Edward Sheldon and ask him on my behalf if he fully approves of the following list of investments or whether he can improve upon it or make advantageous changes:—

City of New York,
State of New York,
City of Newark,
State of New Jersey,
City of Boston,
State of Michigan (?)
City of Philadelphia,
State of Massachusetts,

506

and the five-year obligations of the United States bearing 3¼ per cent interest,—in limited amount.

Please cable me his answer informing me at the same time what amount the Full Board considers available for investment.

Yours sincerely,

E. Higgins.

507

508 *Petitioner's Exhibit 5.*

N. Y. Times Feb 26 '33

BONDS WEAKENED BY NEED FOR FUNDS

Withdrawals by Interior Banks Cause Heavy Selling of Federal Issues for Week.

Corporation Loans Hit

509 Loss on 40 Is Heaviest Since May 28, 1932—Municipal and Foreign Lists Affected.

The steady stream of withdrawals of funds from New York by interior banks and the resultant need of New York banks to put themselves in a more liquid position caused heavy selling of United States Government obligations last week, and put the entire bond market to a severe test. The losses for the week in long-term United States Government bonds, ranging from well above a full point to more than 3 points, were among the most severe for any week on record.

510

The New York Times average for forty representative domestic corporation bonds lost 3.11 points for the week, the heaviest since the week ended on May 28, 1932. The average of 61.88 on the basis of yesterday's closing prices was the lowest since July 28, 1932, and for foreign loans, Saturday's average of 92.10 was the lowest since July 21, 1932. In connection with foreign loans, however, last week's average loss of 2.04 points was not so great as that of the previous week, when it was 2.54 points.

Petitioner's Exhibit 5.

511

LOWEST LEVELS FOR 1933.

All of the Liberty loans and long-term Treasury issues touched their lowest levels for 1933 to date last week, but these low marks were well above the low points for 1932. In other periods of depressed prices for domestic corporation issues and foreign loans, it has usually been the case that United States Government bonds have swung higher, since investment shifted from the former into the latter securities. Last week, however, the decline was general, as the Treasury issues became the pivot on which the rest of the bond market moved.

512

Liquidation started on Feb. 14, following announcement over the previous week-end of the banking moratorium in Michigan, and continued almost without interruption until the rally last Friday, which, in turn was followed by further heavy selling yesterday on the news of the three-day banking holiday proclaimed in Maryland.

In analyzing the decline in the bond market, it is said that the lack of bids due to uncertainty had far more to do with the decline than any indiscriminate pressure of offerings. The decline at all times was reasonably orderly with virtually no evidence of the dumping of securities for what they would bring.

513

LIQUIDATION BY BANKS.

Liquidation by commercial banks, which principally accounted for the decline in the government's long-term issues, also included government obligations of short and intermediate maturities. Of the fourteen issues of the latter group outstanding, five closed the week with bid prices of less than par. All of these issues, it will be recalled, were heavily oversubscribed when they were brought out.

514 *Petitioner's Exhibit 5.*

The drastic decline in United States Government bonds has had its repercussion in the municipal bond market, causing a general slowing up of trading although not a sharp reduction in prices. The tone of the market was reflected last week by the fact that many of the new issues up for award by communities throughout the country failed to attract bids.

New York Times March 1st, 1933.

515

'SHORN LAMB' TELLS SENATORS OF LOSS

Fortune of $225,000 Faded as He Left Investments to a National City Salesman.

ADVISED ON BORROWING

Congress Votes to Continue Inquiry in the First Session of the New Congress.

516

Special to The New York Times.

WASHINGTON, Feb. 28.—Woven into the testimony before the Senate Banking and Currency Committee today concerning some of the activities of the National City Company prior to the stock market crash in 1929, was the story of Edgar Brown, self-styled "shorn lamb" of Pottsville, Pa., who said that on the advice of representatives of the company he converted his fortune of $225,000, largely in cash and United States bonds, into the securities of other governments and domestic stocks.

Petitioner's Exhibit 5.

His investments, Mr. Brown said, resulted from an "abiding faith" in the advice of representatives of the National City Company. 517

The story came as a climax to another day of examination of the officials of the National City Company by Ferdinand Pecora, counsel for the committee, in which he brought out that an issue of $8,000,000 of bonds of the State of Minas Geraes, Brazil, in which the City Company participated, went for some purposes other than stated in the prospectus of the issue.

Meanwhile the Senate passed without a dissenting vote the resolution introduced by Senator Costigan to continue the investigation through the first regular session of the Seventy-third Congress. 518

TURN TO OTHER AFFILIATES FORECAST.

Mr. Pecora has declined to mention the names of any of the investment affiliates of banks to which the inquiry will apply.

Senator Couzens told Mr. Pecora today that he had received complaints against the Chase Securities Corporation and wanted to know why some of its officers had not been summoned to testify. Mr. Pecora replied that there had not been sufficient time, but that he intended to do so if the investigation were continued. 519

Mr. Brown, the "shorn lamb", became the centre of all eyes and the star witness of the day. Giving his address as Pottsville, Pa., he said he was now unemployed and dependent on the "Poor Board".

Advised by a physician in December, 1927, that he had developed tuberculosis and that he should live in California, Mr. Brown, then a theatre owner and producer, sold a chain of theatres for about $125,000 and began looking for sound investments.

520 *Petitioner's Exhibit 5.*

He also had about $100,000 in United States Government bonds, Italian Government bonds and some others. About the time the first instalment on the sale of his property was received he read in a magazine an advertisement of the National City Bank and sent an inquiry. Fred Rummel, a representative of the National City Company, described after the hearing by R. M. Byrnes, a former vice president of the company, as "a country salesman operating out of Philadelphia" who went to interview Mr. Brown, told him he would consult his superiors and advise him later as to what investments he should make.

521 Later, the witness testified, he was advised that "all the securities I then held were all wrong". Borrowing was advised, he said, in order to buy other securities.

The witness borrowed about $150,000 from the National City Bank, the Northeastern Trust Company of Reading, the Pennsylvania National Bank of Pottsville, and the Safe Deposit Bank of Pottsville.

SAYS SHIFT TO STOCKS WAS ADVISED.

The management of the investments was left to Mr. Rummel, the witness said, the only stipulation being that
522 no stocks should be bought. Mr. Pecora mentioned as being among the bonds acquired by Mr. Brown Vienna 6s, German Central Bank 6s, Saxon Public Works 6½s and Remington Rand 5½s.

The market price of the bonds declined and Mr. Brown complained to Mr. Rummel that his prophecies were not carried out. He was told, he continued, that it was because he had prohibited investment in any stocks. He observed that all stocks at that time were booming.

"The explanation sounded reasonable enough to me", Mr. Brown continued, "and so I took it hook, line and sinker".

Petitioner's Exhibit 5.

523

"And did he then buy stocks?" asked Mr. Pecora.

"May I answer that somewhat facetiously?" asked Mr. Brown. "Did he buy stocks!"

A roar of laughter greeted the exclamation.

With that the witness placed on the table a stack of stock purchase certificates about two inches thick.

COMPLAINED TO COMPANY OFFICERS.

Early in 1929 Mr. Brown went to New York to discuss with officers of the National City Company "an irregularity in the trading of Anaconda stock and to report 524
that he was beginning to feel very much like a shorn lamb". He was opposed, he said, to the violent trading in the stock and communicated his attitude to the officers.

"I told them that I was fearful that a reaction in the market might wipe me out and that I had no income on which to depend", he said.

He was referred by H. W. Bebe, vice president of the company, to its Philadelphia office, where the suggestion was made by Mr. Rummel that he convert his present holdings into other stocks.

Having gone to Los Angeles in August, 1929, Mr. Brown said he was asked to transfer his loans from the 525
Eastern banks to those in his own locality, which he did by borrowing $105,000 from the Farmers and Merchants Bank of that city. Of the total loan, $95,000 was used to reduce the Eastern loans and the remaining $10,000 was kept on hand at the bank. He then held, he said, 200 shares of National City Bank stock, 1,000 of Anaconda Copper, 250 shares of Oliver Farm Equipment, 100 of Cannon Mills and some others.

526 *Petitioner's Exhibit 5.*

ADVISED NOT TO SELL, HE SAYS.

A slight decline in the bank stock to $500 determined the witness to dispose of his holdings and get out of the market. With this in mind, he went to the Los Angeles offices of the National City Company.

"It may sound foolish to this committee to say such a thing", said Mr. Brown, "but I was unable to sell, as you will see.

"I was placed in the position of one who was about to put his own mother out of house. As soon as I had
527 communicated my plans I was sourrounded by every salesman in the house and told that to sell would be a very foolish thing to do."

He thereupon temporarily changed his decision to sell and the next day received a telegram from Mr. Rummel in Philadelphia which read:

"National City Bank now $525, sit tight."

How Mr. Rummel found out how to reach him Mr. Brown was at a loss to relate.

"Information as to the status of the stock had absolutely been unsolicited by me," he added.

528 TELLS OF SALE OF STOCK.

He said he continued in his efforts to have the stock sold, and on Oct. 29 the Los Angeles office sold his 200 shares of National City Bank and 400 shares of Anaconda "without my specific command". He said he was called on the phone the night before by Arthur Anderson, manager of the office, and told that the stock was breaking and that he "had better get out from under". He was further advised by Mr. Anderson, he said, that the Farmers and Merchants Bank was calling the loan of $105,000, and that he would have to sell or be wiped out completely.

Petitioner's Exhibit 5.

529

"That advice proved to be untrue, for I went the next day to the bank and asked them about it and was told that the bank would not think of calling the loan", the witness told the committee.

He said he had been previously advised by Mr. Anderson that National City Bank stock probably would go to $750 a share, and that it would reach $1,500 before it would ever drop to $500. For that reason, he explained, he was reluctant to sell at that particular time.

For the sale of the stock, Mr. Brown said, he received $320 a share, compared with $460 a share as the closing quotation the night before. He further stated that The Wall Street Journal on Oct. 29, the day of the sale, quoted the stock at $360.

530

Even after placing his order with Mr. Anderson to sell, Mr. Brown continued, he went only as far as the door of the office, where he met his wife, and, on being corrected by her for his rash action immediatey retraced his steps and asked that the sale be revoked. He was informed by Mr. Anderson that it was too late, that the sale already had been placed.

As a result of these developments, Mr. Brown said, he was left with only $25,000, and the remainder of his testimony outlined his frantic efforts to obtain a loan to buy back his former holdings of Anaconda and National City Bank stock.

531

In a letter to Mr. Bebe of the National City Company in New York, Mr. Brown complained of his "bad treatment" and that he had been pauperized "because of my abiding faith in the National City Company". A request for a loan to recoup was denied on the ground that the company could make collateral loans only where the borrower had an assured income and showed ability to repay in six months.

532 *Petitioner's Exhibit 5.*

BOND UNDERWRITINGS DESCRIBED.

R. M. Byrnes, former vice president of the National City Company, and George F. Train of the foreign loan department of that company, testified concerning the participation of the company in underwriting two issues of bonds of the State of Minas Geraes aggregating $16,500,000.

The first, an issue of $8,500,000, was in March, 1928, which marked the introduction of the State's credit in the New York market. The second, an issue amounting to $8,000,000, was undertaken by the company in September, 1929, in conjunction with the London house of J. Henry Schroeder & Co., its advertised purpose being for "increasing the economic productivity of the State of Minas Geraes".

533

Mr. Pecora elicited, however, that between the first and second bond issues the two underwriters had made short-term loans to the State aggregating about $4,000,000, and that it was as partly with a view of paying off the short-term loans that the second issue was floated.

AS TO THE PERUVIAN BONDS.

534 Mr. Byrnes was asked if it was on his recommendation that the National City Company floated bonds for the Peruvian Government, and if so, how he came to change his opinions radically with respect to the value of such an issue. He replied by taking full responsibility for all the loans marketed for the Peruvian Government in New York by the National City Company, aggregating $90,000,000.

It was these issues of Peruvian securities to which the committee devoted its entire attention yesterday. It was then shown that the company had been advised by C. W.

535

Durrell, its overseas manager then in Lima, that Peru's economic condition was not likely to change for the better, and meanwhile he forecast a bad credit risk with a continuing "bad-debt record".

Like Victor Schoepperle, vice president of the National City Company, who testified yesterday, Mr. Byrnes said he had never seen nor heard of the Durrell letter prior to its being placed in the record. He said he had not the slightest idea why it was not shown to him, unless it was because he was on vacation at the time, and was not advised if it on his return to New York. Mr. Byrnes would not agree with Mr. Pecora's definition of an "expert on credit", implying that he would not place Mr. Durrell in that category.

536

CLASH ON PREVIOUS DEFAULTS.

Turning again to the National City Company's participation in the underwriting of $8,500,000 6 per cent gold bonds of the State of Minas Geraes, Mr. Pecora brought from Mr. Byrnes an acknowledgment that at the time of his approval of the issue he was aware that the State already had defaulted on $42,000,000 of its bonds marketed in Paris and London from 1907 to 1916.

537

But Mr. Byrnes insisted that the committee should differentiate between the various kinds of default. The State's failure to meet its obligations when due resulted from the failure of the house acting as its fiscal agent in Paris, he pointed out.

Also, he added, refusal to pay followed an interpretation by the French courts that the settlement should be made in gold rather than in paper.

The first Brazilian issue was offered at 97½ and accrued interest in New York by the National City Company,

538 *Petitioner's Exhibit 5.*

J. Henry Schroeder & Co., and Kenney, Kissel & Co., with a spread of 4.33 points between the prices at which the bonds were acquired by the bankers and sold to the public.

Mr. Pecora asked the reason for a spread of 10 points between the offering price of the two Brazilian issues and was advised that it was due entirely to changed market conditions.

PROSPECTUS IS QUESTIONED.

539 "Well, why was the public not advised of the real purpose of the second $8,000,000 issue, or that it was part for refunding the $4,000,000 of short-term loans previously advanced?" Mr. Pecora inquired.

"Because the public is interested only in the essential facts and not in the mechanical details", said Mr. Byrnes.

"Why wasn't the investor told that the purpose of the issue was for paying off the short-term loans instead of for purposes of increasing productivity of the State?" Mr. Pecora asked.

"Because, in my opinion, no investor would be in the slightest interested nor his investment in the east af-
540 fected", replied Mr. Byrnes.

"As a matter of fact", persisted Mr. Pecora, "doesn't the average investor rely on the prestige of the offering house, and don't you think the prestige of the National City Bank had anything to do with the prestige acquired by the National City Company over a period of years?".

Mr. Byrnes replied in the negative.

Mr. Train was asked about a letter he wrote to the Buenos Aires office of the National City Bank in which he said that "uneasiness was being expressed in the New York office" over the unwillingness of the State of Minas Geraes to meet its external obligations.

Petitioner's Exhibit 5.

541

The uneasiness consisted entirely of a "friendly difference of opinion between Mr. Schoepperle and myself", concerning the intentions of the State, Mr. Train replied.

He was reminded that both of the State issues floated in New York as well as the Paris loans were in default, and was asked how, in view of his experience with the State's credit, he could certify in a prospectus of both issues that "prudent and safe finances have been axiomatic of successive administrations in the State of Minas Geraes".

ENTHUSIASTIC ABOUT BRAZIL.

542

Mr. Train's explanation was that at the time he certified to the statement he was in Brazil and was "naturally enthusiastic" about the credit of the country. When he referred to prudent and safe financing, however, he had in mind only the State's handling of its internal debt. He said it was for this reason that the people of the State had come to be known as the "Scotchmen of South America".

Mr. Pecora showed to the witness a memorandum he had prepared in April, 1927, in which Mr. Train, referring to the State, wrote that "the laxness of its finances is almost fantastic", and that "it would be hard to find 543
anywhere greater ineptitude, negligence and carelessness in the handling of its external loans".

Mr. Train replied that these references were to conditions prevailing up to 1916.

He gave as the motive for the National City Company's participation in the short-term loans to the State its unwillingness to have Kuhn, Loeb & Co. and Lee Higginson & Co. "chiseling in" on the field of Brazilian credit, which it had first introduced into the New York market.

"Chiseling in!" exclaimed Mr. Pecora. "That is not a banking term, is it?"

544 *Petitioner's Exhibit 5.*

"Perhaps I should say that the purpose of the short-term loans was in order to retain the good-will of the State of Minas Geraes", said Mr. Train.

Of the two bond issues of $16,500,000, about $12,000,000 were sold in the United States and the rest in Europe, the witness explained.

No. 1,586

545 Port d'Antibes, March 15th, 1933

S.Y. THALASSA

Dear Mr. Whitehead,

On March 13th, I sent you the following cable:
"CAN SUCH BONDS AS I USUALLY INVEST IN BE BOUGHT ON NEWYORK STOCK EXCHANGE WITH THE RESULTING CONTROL OF PURCHASE PRICE."

to which you replied:

"YOUR CABLEGRAM RECEIVED stop STOCK EX-
546 CHANGE CLOSED stop BY ORDER GOVERNMENT NO TRANSACTIONS STOCKS OR BONDS CAN BE MADE OUTSIDE STOCK EXCHANGE AT PRESENT."

Yesterday I wired you as follows:

"MY ENQUIRY NOT FOR PRESENT BUT FOR FUTURE DO NOT CONSULT TRISTRAM REGARDING THIS QUESTION stop WHEN I NEXT INVEST WANT TO BE ASSURED NOT PAYING EXTRAVAGANT PRICES stop UP TO PRESENT COULD FIND NO

Petitioner's Exhibit 5.

547

WAY CHECKING PRICES WHEREAS IF PURCHASES WERE MADE ON STOCK EXCHANGE COULD CHECK PRICES."

Enclose you lease in duplicate to Messrs. Underhill, Clinch & Company for the premises No. 84 & 86 White Street, for one year from May 1st, 1933, at six thousand dollars ($6,000.) per annum, signed before the American Consul at Nice.

This morning your cable was received reading as follows:

548

"UNITEDSTATES BONDS BOUGHT ON STOCK EXCHANGE stop STATE AND MUNICIPAL BONDS CANNOT BE BOUGHT ON EXCHANGE stop STATE AND MUNICIPAL BONDS DEALT IN BY BANKING AND BROKERAGE HOUSES stop NO PUBLICATION REPORTS PRICE SALE STATE AND MUNICIPAL BONDS stop FINANCIAL CHRONICLE SOMETIMES GIVES INFORMATION AS TO YIELD BUT DOES NOT REPORT SALES."

In reply this morning I sent you the following wire:

549

"PLEASE WRITE ME WHAT FULL BOARD CONTROL CONSIDERS BEST METHOD TO EMPLOY WHEN NEXT MAKING BONDS INVESTMENT TO AVOID PAYING EXCESSIVE PRICES FOR SAME."

Yours sincerely,

E. HIGGINS

W

Petitioner's Exhibit 5.

550 FRENCH CABLE COMPANY

NA1 50 CABLE VIA FRENCH

ANTIBES 945 MAR 25 1933

LCD GLEN

NEW YORK (EUGENE HIGGINS 50 UNION SQUARE EAST)

PRESUMABLY YOUR CABLE REPORTING INTERVIEW WITH SHELDON JUST DELIVERED UNSIGNED STOP SHALL AWAIT YOUR LETTER REPORTING FULL BOARDS SUGGESTIONS REGARDING PRICE CONTROL INVESTMENT BEFORE DECIDING STOP WHEN WAS THIS LETTER MAILED I DONT APPROVE RECENT UNITED STATES NOTES BECAUSE SHORT TERMED AND UNREGISTERABLE WITH PRICES UNCONTROLED

551

HIGGINS

820A

X

552

No. 1,588

Post d'Antibes, March 25th, 1933

S.Y. THALASSA

Dear Mr. Whitehead,

Received your letter No. 3,035 of March 14th, 1933. Last night I received your cable reading as follows:

"YOUR LETTER MARCH THIRTEEN RECEIVED stop SAW SHELDON HE SAYS DOES NOT FAVOR INVESTING NOW stop IF YOU DECIDE INVEST NOW HE RECOMMENDS UNITEDSTATES THREE AND

Petitioner's Exhibit 5.

553

ONEQUARTER PERCENT NOTES OR UNITED STATES TWO AND FIVEEIGHT PERCENT NOTES stop THESE NOTES ARE TAX EXEMPT BUT ARE COUPON NOTES AND CANNOT BE REGISTERED stop I WROTE YOU ABOUT THESE NOTES MARCH TWENTYONE stop SHELDON SAYS AS SECOND CHOICE HE RECOMMENDS NEWYORK STATE BONDS stop YOUR BALANCE TRISTRAM SIXHUNDRED FIFTY THOUSAND AND ELEVEN DOLLARS NATIONALCITY FOURTEEN THOUSAND THREEHUNDRED THIRTY TOTAL SIXHUNDRED SIXTY-
554
FOUR THOUSAND THREEHUNDRED FORTYONE stop FULL BOARD CONSIDERS YOU CAN SAFELY INVEST FIVEHUNDRED THOUSAND."

to which I replied this morning:

"PRESUMABLY YOUR CABLE REPORTING INTERVIEW WITH SHELDON JUST DELIVERED UNSIGNED stop SHALL AWAIT YOUR LETTER REPORTING FULL BOARDS SUGGESTIONS REGARDING PRICE CONTROL INVESTMENT BEFORE DECIDING stop WHEN WAS THIS LETTER MAILED I DONT APPROVE RECENT UNITED STATES NOTES BECAUSE SHORT TERMED AND UNREGISTER-
555
ABLE WITH PRICES UNCONTROLED."

I am for the present keeping the original of your cable, but shall forward it to you later on for the purpose of investigation if you write me that this cable was signed by you before you had it delivered to the cable office.

Yours sincerely,

E. HIGGINS

556 *Petitioner's Exhibit 5.*

Attached clipping from New York Times of March 3, 1933 entitled "Continued Selling Sends Bonds Down."

N. Y. Times March 3 '33

CONTINUED SELLING SENDS BONDS DOWN

Many Issues in All Groups on Stock Exchange Touch Year's Lowest Levels.

557

FEDERAL LIST WEAKENS

Japanese and German Loans Advance—Turnover for Day $15,243,500.

Further liquidation in the listed bond market yesterday carried many issues in all groups to new lows for the year. Total transactions on the Stock Exchange reached $15,243,-
558 500, compared with $12,914,200 on the previous day. Of yesterday's total, dealings in United States Government bonds accounted for $5,844,500, the heaviest for a single day since June 29, 1932.

The widespread movement for bank and institutional liquidity sent United States Government bonds down 11-32 to 1 28-32 points, establishing new lows for the year in all of the active issues. These lows, however, are still many points above the lowest levels touched last year.

A net loss of 2 points in United Kingdom 5½s due in 1937, which usually show fluctuations of small fractions,

559

was ascribed to the general liquidation movement; since sterling mounted sharply yesterday in line with the favorable showing of the Bank of England statement. The 5½s closed at 104½. Bonds of the Japanese and German groups pointed higher, while French and Belgian loans were irregularly lower. Most of the price changes in South American issues were of a minor character.

Only a comparatively small list of domestic issues was able to show any appreciable improvement. As measured by THE NEW YORK TIMES averages, leading issues in the industrial, public utility and railroad group were lower in the order named.

560

Domestic bonds on the Curb Exchange were weak, and foreign loans were irregularly lower. The increase in dealings over those of the previous day, however, did not show nearly as high a percentage as on the Stock Exchange.

New York City bonds traded in the over-the-counter market were unchanged to 3 points off for the day. The market was little better than nominal.

FRENCH CABLE COMPANY

561

NA5 73 CABLE VIA FRENCH

ANTIBES 1050A Mar 28 1933

LCD GLEN

NEWYORK (EUGENE HIGGINS 50 UNION SQ EAST) SOME TIME AGO SHELDON ADVISED ME TO AWAIT CONVENING OF CONGRESS BEFORE INVESTING STOP. NOW AFTER CONGRESS HAS CONVENED HE CONTINUES ADVISING WAITING STOP WHEN DOES HE CONSIDER TIME WILL BE PROPITIOUS AND WHY STOP I NOTE MANY GOV-

562 *Petitioner's Exhibit 5.*

ERNMENT LIBERTY AND TREASURY BONDS SOLD VERY LOW ON STOCKEXCHANGE DURING FEBRUARY COULD NOT THESE ADVANTAGEOUSLY BE BOUGHT FROM TIME TO TIME IN SMALL OR LARGE LOTS AS OFFERED ON STOCKEXCHANGE

HIGGINS

846A

Z

563

S.Y. THALASSA Port d'Antibes, March ~~29th~~, 1933

AHE

Dear Mr. Sheldon,

This morning Mr. Whitehead cabled me of his interview with you yesterday and informed me of your intention to write advising on investments at present.

I have recently noticed many sales on the New York Stock Exchange of United States Government's Liberty Bonds at low and fluctuating prices and pending the arrival
564 of your letter and in the meantime I will ask you to please buy me from my account current such United States First Liberty Registered Bonds, three and one half per cent, tax and surtax exempt, as you can buy on the New York Stock Exchange in large or small quantities, which you may from time to time be able to obtain at low and reasonable prices.

I wish to invest a total, all told, of Five hundred thousand—($500,000.-)—Dollars, par value.

When bought, please have these securities at once registered in my name and delivered against receipt to my

Petitioner's Exhibit 5.

565

representative at my office, No. 50 Union Square East, New York City.

Please cable me receipt of this letter and believe me with kind regards,

Very sincerely yours,

EUGENE HIGGINS.

AA

566

FRENCH CABLE COMPANY

Apr 3 1933
1933 Apr 3 AM 7 47

D 84
HD OL1032 ANTIBES 59

LC SHELDON CARE TRISTRAM NY
LETTER TO WHITEHEAD ADVISING INVESTMENTS RECEIVED MANY THANKS STOP AS I DONT CARE BUY THOSE TREASURY NOTES WILL ASK YOU TO CONTINUE PICKING UP UNITED- 567
STATES FIRST LIBERTY THREE ONEHALF PERCENT BONDS AS YOU MAY FROM TIME TO TIME OBTAIN ON STOCK EXCHANGE AT REASONABLE PRICES AS PER MY LETTER MARCH TWENTY-NINE REGARDS

EUGENE HIGGINS

BB

568 *Petitioner's Exhibit 5.*

No. 1,590

S.Y. THALASSA Port d'Antibes, March 29th, 1933.

Dear Mr. Whitehead,

Yesterday I sent you the following cable:—

SOME TIME AGO SHELDON ADVISED ME TO AWAIT CONVENING OF CONGRESS BEFORE INVESTING stop NOW AFTER CONGRESS HAS CONVENED HE CONTINUES ADVISING WAITING stop
569 WHEN DOES HE CONSIDER TIME WILL BE PROPITIOUS AND WHY stop I NOTE MANY GOVERNMENT LIBERTY AND TREASURY BONDS SOLD VERY LOW ON STOCK EXCHANGE DURING FEBRUARY COULD NOT THESE ADVANTAGEOUSLY BE BOUGHT FROM TIME TO TIME IN SMALL OR LARGE LOTS AS OFFERED ON STOCK EXCHANGE."

to which your reply came this morning as follows:—

SAW SHELDON TODAY HE CONSIDERS YOU WILL NOT LOSE BY WAITING INVESTING stop HE
570 WOULD LIKE SEE WHAT GOVERNMENT WILL DO ABOUT LOANS MATURING AND ISSUING NEW LOANS stop ONLY UNITED STATES TAXEXEMPT BONDS WHICH CAN BE REGISTERED ARE FIRST LIBERTY THREE AND ONEHALF PERCENT stop SHELDON WILL WRITE."

This morning I cabled you as follows:—

CABLED TRISTRAM FOLLOWING stop PENDING ARRIVAL YOUR LETTER ADVISING INVESTMENTS IF YOU CAN PICK UP AT REASONABLY LOW PRICES ON NEWYORK STOCK EXCHANGE

Petitioner's Exhibit 5.

571

SMALL OR LARGE QUANTITIES UNITED STATES FIRST LIBERTY REGISTERED THREE AND ONE-HALF PERCENT BONDS TAX SURTAX EXEMPT PLEASE BUY SAME FROM MY CURRENT ACCOUNT TOTAL INVESTMENT NOT TO EXCEED FIVEHUNDRED THOUSAND DOLLARS MAILING TODAY LETTER CONFIRMING ABOVE INSTRUCTIONS."

Enclose you copy of the letter mentioned in above cablegram which I sent this morning to Mr. Sheldon.

Please note to discontinue my subscription to "Chemical Abstracts", after present subscription is finished. 572

Yours sincerely,

E. HIGGINS.

CC

COPY

Port d'Antibes, March 29th, 1933

573

Dear Mr. Sheldon:

This morning Mr. Whitehead cabled me of his interview with you yesterday and informed me of your intention to write advising on investments at present.

I have recently noticed many sales on the New York Stock Exchange of United States Government's Liberty Bonds at low and fluctuating prices and pending the arrival of your letter and in the meantime I will ask you to please buy me from my account current such United States First Liberty Registered Bonds, three and one half

Petitioner's Exhibit 5.

574 per cent, tax and surtax exempt, as you can buy on the New York Stock Exchange in large or small quantities, which you may from time to time be able to obtain at low and reasonable prices.

I wish to invest a total, all told of Five hundred thousand ($500,000.)—Dollars, par value.

When bought, please have these securities at once registered in my name and delivered against receipt to my representative at my office, No. 50 Union Square East, New York City.

Please cable me receipt of this letter and believe me
575 with kind regards,

Very sincerely yours,

FRENCH CABLE COMPANY

NA5 64 CABLE VIA FRENCH

ANTIBES 1220 MAR 29 1933

LCD GLEN

NEWYORK (EUGENE HIGGINS 50 UNION SQ
576 EAST)

CABLED TRISTRAM FOLLOWING STOP PENDING ARRIVAL YOUR LETTER ADVISING INVESTMENTS IF YOU CAN PICK UP AT REASONABLY LOW PRICES ON NEWYORK STOCK EXCHANGE SMALL OR LARGE QUANTITIES UNITED STATES FIRST LIBERTY REGISTERED THREE AND ONE-HALF PERCENT BONDS TAX SURTAX EXEMPT PLEASE BUY SAME FROM MY CURRENT ACCOUNT TOTAL INVESTMENT NOT TO EXCEED

Petitioner's Exhibit 5.

577

FIVEHUNDRED THOUSAND DOLLARS MAILING TODAY LETTER CONFIRMING ABOVE INSTRUCTIONS

HIGGINS
854A

DD

FRENCH CABLE COMPANY

T
NA 1 49 CABLE VIA FRENCH 578
LC GLEN ANTIBES APR 3 1933

NEWYORK (EUGENE HIGGINS 50 UNION SQ EAST)

CABLED SHELDON FOLLOWING AS I DONT CARE BUY THOSE TREASURY NOTE WILL ASK YOU TO CONTINUE PICKING UP UNITED STATES FIRST LIBERTY THREE ONEHALF PERCENT BONDS AS YOU MAY FROM TIME TO TIME OBTAIN ON STOCK EXCHANGE AT REASONABLE PRICES AS PER MY LETTER MARCH TWENTYNINE

HIGGINS 579

EE

No. 1,591

Port d'Antibes, April 7th, 1933

S.Y. THALASSA

Dear Mr. Whitehead,

Received your letters No. 3,037 of March 21st, and No. 3,038 of March 24th, 1933.

Petitioner's Exhibit 5.

On April 3rd, I cabled you as follows:

"CABLED SHELDON FOLLOWING AS I DONT CARE BUY THOSE TREASURY NOTES WILL ASK YOU TO CONTINUE PICKING UP UNITED STATES FIRST LIBERTY THREE ONEHALF PERCENT BONDS AS YOU MAY FROM TIME TO TIME OBTAIN ON STOCK EXCHANGE AT REASONABLE PRICES AS PER MY LETTER MARCH TWENTY-NINE."

On April 4th, I received the following cable from Mr. Sheldon:—

"YOUR CABLE RECEIVED TODAY WE HAVE ALREADY BOUGHT FOR YOUR ACCOUNT FOUR-HUNDRED THOUSAND FIRST LIBERTY 3½ PER-CENT BONDS AND EXPECT TO BUY REMAINING HUNDRED THOUSAND IN SHORT TIME."

Enclose you one check numbered 7,105 for Five Thousand—($5,000.-)—Dollars for deposit to my credit in the Garfield Branch of the Chase National Bank.

Yours sincerely,

E. Higgins

FF

FRENCH CABLE COMPANY

850 BROADWAY
Tel. ALgonquin 4-1362

NA5 48 CABLE VIA FRENCH

PARIS NFT SEP 20 1933

LC GLEN

NEWYORK (EUGENE HIGGINS
50 UNION SQUARE EAST)

WHAT AMOUNT DOES BOARD NOW CONSIDER AVAILABLE INVESTMENT DOES SHELDON AD-

Petitioner's Exhibit 5.

583

VISE INVESTING NOW OR AWAITING INFLATION OR DOLLAR STABILIZATION AND WHICH HE CONSIDERS PROBABLE AND WHEN ALSO WHETHER CAN ADVISE BETTER INVESTMENT THAN UNITEDSTATES FIRST LIBERTY REGISTERED BONDS THREE ONEHALF PERCENT TAX SURTAX EXEMPT

HIGGINS
713A

GG

584

7 Place D'Iena, XVI PARIS, September 21st, 1933.

Edward Sheldon, Esq.,
Chairman of the Board of Directors,
United States Trust Co of New York,
45-47 Wall St.
New York City. (U. S .A.).

Dear Mr. Sheldon,

Will you please buy me from my current account such United States First Liberty Registered Bonds Three and onehalf per cent, tax and surtax exempt, as you can buy on the New York stock exchange, in large or small quantities, which you may from time to time be able to obtain at low and reasonable prices, up to the total all told, par value, of Four Hundred and Twenty Five—($425,000.-)—Thousand Dollars. 585

When bought, please have these securities at once registered in my name and delivered against receipt to my representative at my office, No. 50 Union Square East, New York City.

Petitioner's Exhibit 5.

586

Kindly cable me receipt of this letter and believe me with kind regards,

Sincerely yours,

EUGENE HIGGINS

HH

7 Place D'Iena, XVI

PARIS, June 26th, 1934

587

Received
11 AM
1934
Jul
5

United States Trust Co of NY

The United States Trust Co of New York,
45 - 47 Wall Street,
New York City

588 Dear Sirs,

Will you please buy me from my current account such United States First Liberty Registered Bonds Three and one half per cent, tax and surtax exempt, as you can buy on the New York stock exchange, in large or small quantities, which you may from time to time be able to obtain at low and reasonable prices, up to the total all told, par value, of Five Hundred Thousand—($500,000.-)—Dollars.

When bought, please have these securities at once registered in my name and delivered against receipt to my representative at my office, No. 50 Union Square East, New York City.

Petitioner's Exhibit 5. 589

Kindly cable me receipt of this letter and believe me with kind regards

Sincerely yours,

EUGENE HIGGINS

II

S.Y. THALASSA Port d'Antibes, February 22nd, 1935. 590
The United States Trust Co of New York,
45-47 Wall Street,
New York City.

Dear Sirs,

Will you please buy me from my current account such United States First Liberty Registered Bonds Three and One half per cent, tax and surtax exempt, as you can buy on the New York stock exchange, in large or small quantities, which you may from time to time be able to obtain at low and reasonable prices, up to the total all told, par value, of Five Hundred and Twenty Five ($525,000.-) Thou- 591
sand Dollars.

Should you, however, be able to obtain large blocks of above Bonds at private sale outside the New York stock exchange at prices within a small fraction of the price quoted on the New York stock exchange on the same day, please buy such United States First Liberty Registered Bonds Three and One Half per cent, tax and surtax exempt.

When bought, please have these securities at once registered in my name and delivered against receipt to my

592 *Petitioner's Exhibit 5.*

representative at my office, No. 50 Union Square East, New York City.

Kindly cable me receipt of this letter and oblige

Yours sincerely,

EUGENE HIGGINS

JJ

---

593 FRENCH CABLE COMPANY

NA5 56 CABLE VIA FRENCH
PARIS 1015 JUL 16 1934

LC GLEN

NEWYORK (EUGENE HIGGINS
50 UNION SQUARE EAST)

WERE THOSE LIBERTY BONDS JUST PURCHASED ALL BOUGHT ON STOCK EXCHANGE AS DIRECTED PRICE SEEMS VERY HIGH DOES BOARD ADVISES MY SELLING SOME OR ALL FEDERAL
594 LAND BANK BONDS AS SUGGESTED BY VICE PRESIDENT KEELER WHAT PRICE WOULD THEY FETCH NOW PLEASE THANK KEELER AM LEAVING PARIS TOMORROW TUESDAY MORNING FOR ENGLAND

HIGGINS
70A

KK

Petitioner's Exhibit 5.

595

POSTAL TELEGRAPH

850 Broadway
Tel. ALgonquin 4-1362

M 53 62 CABLE—FOLKESTONE 530P JUL 17 1934
LC GLEN—NEWYORK

(EUGENE HIGGINS 50 UNION SQ EAST)—

DONT YOU AND STEARNS CONSIDER TRISTRAM EXTREMELY REMISS IN CALMLY DISOBEYING PLAINLY WRITTEN INSTRUCTIONS TO BUY THOSE BONDS ON STOCK EXCHANGE WHERE 596
BONDS ARE CHEAPER THIS WOULD NOT HAVE OCCURED UNDER SHELDONS REGIME WHAT DO YOU BOTH ADVISE IN MATTER AND WHAT ARRANGEMENT FOR FUTURE WRITTEN INSTRUCTIONS OBEYED WHEN DOES STEARNS RETURN CABLES HIGGINS HOTEL METROPOLE FOLKESTONE ENGLAND—

HIGGINS
1228P

LL

597

598

Petitioner's Exhibit 6.

PETITION

UNITED STATES BOARD OF TAX APPEALS

Appeal of EUGENE HIGGINS, 50 Union Square, New York, New York.	Doc 12177

599

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue as set forth in his deficiency letter (symbols IT:PA-2 CRY-205-60D) dated December 21, 1925, and as the basis of his appeal sets forth the following:

I: The taxpayer is an individual and is a citizen of the United States, residing at 7 Place d'Iena, Paris, France, with an office in the United States located at 50 Union Square, New York New York.

600 II: The deficiency letter (a copy of which is attached hereto marked Taxpayer's Exhibit No. 1) was mailed to the taxpayer on December 21, 1925.

III: The tax in controversy is for income tax for the calendar year 1921 and is for more than $10,000, to wit: $80,887.52.

ASSIGNMENTS OF ERROR

IV: The determination of tax contained in the said deficiency letter is based upon the following errors:

Petitioner's Exhibit 6.

601

(1) The Commissioner of Internal Revenue determined that the taxpayer made a profit of $113,773.00 on the alleged sale of certain rights or privileges to subscribe to stock in the Glen Alden Coal Company, whereas the Commissioner should have determined that the taxpayer's sale and purchase of certain anticipated rights or privileges to subscribe to the stock of the Glen Alden Coal Company "when, as and if issued" was a transaction by which the taxpayer sustained a loss of $16,285.32.

(2) The Commissioner of Internal Revenue is in error in alleging that the taxpayer received $113,773.00 on the alleged sale of rights to subscribe to 3,100 shares of stock of the Glen Alden Coal Company. The gross income to the taxpayer under any construction of the contract of sale could not have been more than $98,800.00.

602

STATEMENT OF FACTS

V: The facts upon which the taxpayer relies as the basis of his appeal are as follows:

FIRST: The taxpayer was during the months of May and June, 1921, a stockholder of The Delaware, Lackawanna and Western Railroad Company, owning 20,529 shares of the said stock.

603

SECOND: On May 16, 1921, The Delaware, Lackawanna and Western Railroad Company issued a circular letter to its stockholders, a copy of which is attached hereto and marked Taxpayer's Exhibit No. 2, advising, among other things, that it had prepared a contract for the sale of its coal properties to the Glen Alden Coal Company for the sum of $60,000,000. It further stated that there would be a special

604 meeting of the stockholders on July 21, 1921, at which the contract would be submitted to the stockholders for approval.

THIRD: On or about May 16, 1921, the taxpayer received a circular letter from the Glen Alden Coal Company stating that the said company had offered The Delaware, Lackawanna and Western Railroad Company the sum of $60,000,000. for its anthracite coal properties and that the stock of the said Glen Alden Coal Company would before June 20, 1921, be offered to the stockholders of The Delaware, Lackawanna and Western Railroad Company, of record, at the close of business, June 15, 1921, at the price of $5.00 per share. A copy of the above mentioned circular letter is attached hereto marked Taxpayer's Exhibit No. 3.

605

FOURTH: It is a custom among brokers to trade in shares not yet issued on a "when, as and if issued" basis. Such trades are made by means of executory contracts between two persons by which one agrees to deliver and the other agrees to receive and pay for certain shares (or the rights to subcribe thereto) only if such shares (or rights) are actually issued. If not issued, the contract fails of operation.

606

FIFTH: It was generally expected that the shares of the Glen Alden Coal Company, when issued, would have a market value greatly in excess of $5.00 per share. Trading commenced immediately in the anticipated rights to subscribe for such shares at $5.00 per share, which rights were expected to accrue to the stockholders of The Delaware, Lackawanna and Western Railroad Company.

SIXTH: The taxpayer through the brokerage firm of Evans, Stillman & Company, 60 Broadway, New York, New

Petitioner's Exhibit 6.

607

York, on the following dates made a series of contracts at prevailing market prices with various persons to deliver certain anticipated rights or privileges to subscribe to the stock of the Glen Alden Coal Company at $5.00 per share "when, as and if issued":

Date	No. of Shares		Consideration to be received per share (in dollars)	Total Consideration
May 21, 1921	500	at	30½	$15,250
" " "	100	"	30¼	3,025
" " "	200	"	31	6,200
" 23 "	300	"	30½	9,150
" " "	200	"	30	6,000
" " "	100	"	30¼	3,025
" " "	100	"	30¾	3,075
" 25 "	100	"	30	3,000
" " "	100	"	30¾	3,075
" " "	100	"	30½	3,050
" " "	200	"	31	6,200
" 26 "	200	"	32	6,400
" " "	100	"	32½	3,250
" " "	100	"	33¼	3,325
" " "	200	"	34½	6,900
" " "	100	"	35	3,500
" " "	100	"	35¼	3,525
" " "	200	"	36	7,200
" 27 "	100	"	36½	3,650
	3,100			$98,800
			Less brokerage expense,	527
				$98,273

608

609

610 *Petitioner's Exhibit 6.*

SEVENTH: The total agreed consideration to be paid on the above contracts amounted to the sum of $98,273.00, no part of which was received by the taxpayer.

EIGHTH: The taxpayer did not during the period from May 21, 1921 to May 27, 1921, possess any right or privilege to subscribe to stock in the Glen Alden Coal Company.

NINTH: No money was received by the taxpayer or his representatives under the contracts specified above in paragraph "Sixth", as the contracts were subject to the
611 condition "when, as and if issued".

TENTH: The taxpayer entered into other contracts on the following dates through the brokerage firm of Evans, Stillman & Company, 60 Broadway, New York, New York, by which he agreed to purchase, at the prices indicated below, stock of the Glen Alden Coal Company "when, as and if issued":

Date	No. of Shares		Consideration to be paid per share (in dollars)	Total Consideration
612 June 14, 1921	400	at	41	$ 16,400
" " "	180	"	40½	7,290
" 15 "	100	"	36	3,600
" 16 "	100	"	40¾	4,075
" 17 "	3791	"	42	159,222
Total	4571			$190,587

ELEVENTH: Under date of June 18, 1921, the Glen Alden Coal Company sent a notice to the stockholders of The Delaware, Lackawanna and Western Railroad Com-

613

pany specifying the number of shares to which each was invited to subscribe. A copy of the form of this notice and subscription blank is attached hereto marked Taxpayer's Exhibit No. 4.

TWELFTH: On June 19, 1921, the taxpayer through his representative received from the Glen Alden Coal Company a notice similar to the form set forth in Taxpayer's Exhibit No. 4. It was forwarded by mail to the taxpayer at his residence in Paris.

614 THIRTEENTH: No subscription warrants were ever issued and therefore in accordance with the prevailing custom, the contracts specified in paragraph "Sixth" were performed by the delivery of shares, instead of rights, and the payment by the purchaser of $5.00 per share in addition to the prices agreed upon for the rights.

FOURTEENTH: On or before June 28, 1921, settlement was made on behalf of the taxpayer through the said Evans, Stillman & Company by which the contracts specified in paragraph "Sixth" to deliver rights to subscribe to 3,100 shares of the said Glen Alden Coal Company, were fulfilled and executed for the taxpayer by delivery of con- 615 tracts to receive 3,100 shares of said stock, out of the contracts entered into by the taxpayer as specified in paragraph "Tenth" above.

FIFTEENTH: On July 5, 1921, the said Evans, Stillman & Company delivered to the taxpayer's agent 1,471 shares of the Glen Alden Coal Company, being the remainder of the shares acquired by the contracts specified in paragraph "Tenth" above.

SIXTEENTH: Sometime in August, 1921, the taxpayer's agent received back the subscription blank referred to in

616 *Petitioner's Exhibit 6.*

paragraph "Twelfth", duly executed by the taxpayer for 20,529 shares of the Glen Alden Coal Company stock, to which shares he was entitled to subscribe by virtue of being a stockholder of The Delaware, Lackawanna and Western Railroad Company, and duly deposited the same with the Farmers' Loan and Trust Company, together with a check for $102,645.00.

SEVENTEENTH: Taxpayer therefore purchased 1,471 shares of stock of the Glen Alden Coal Company through his brokers the said Evans, Stillman & Company, and pur-
617 chased 20,529 shares from the Glen Alden Coal Company, making a total of 22,000 shares, which have at all times thereafter been retained by him as an investment.

EIGHTEENTH: The contract to sell the rights to subscribe to 3,100 shares of the Glen Alden Coal Company was an executory contract, from which no gain or loss could arise until executed.

NINETEENTH: Said contract was in actual fact executed by the delivery on or before June 28, 1921, of other contracts acquired by the taxpayer as specified in para-
618 graph "Tenth" above.

TWENTIETH: The sum of $16,285.32 was a loss sustained by the taxpayer in 1921 in a transaction entered into for profit.

TWENTY-FIRST: The taxpayer did not contract to deliver rights to subscribe to 3,100 shares of the Glen Alden Coal Company out of the rights which he may have expected to receive as stockholder of The Delaware, Lackawanna and Western Railroad Company but which rights

619

did not exist when the contracts were entered into, and he did not in fact satisfy said contract by delivery of any such rights or any stock acquired by virtue of such rights.

PROPOSITIONS OF LAW

VI: The taxpayer in support of his appeal relies upon the following propositions of law:

(a) Where a taxpayer agrees to sell property he may elect to purchase such property to fulfill such agreement, notwithstanding he owns similar property which might otherwise have been used to fulfill such agreement.

620

(b) The motive of a taxpayer in choosing to purchase additional property to fulfill an agreement to sell is immaterial, although the result may be to reduce his liability for tax on the profits.

(c) An agreement to sell at a fixed price rights to subscribe to stock, "when, as and if issued", is not capable of producing gain until executed.

(d) The gain or loss arising from the execution of an agreement to sell at a fixed price rights to subscribe to stock "when, as and if issued" depends upon the cost of such rights to the seller.

621

(e) Where property such as shares of stock, or rights to subscribe thereto, are sold, and the shares or rights as sold can be identified, the profit or loss is determined by comparison of the cost of the particular shares or rights with the selling price.

Petitioner's Exhibit 6.

622

(f) Where a contract is entered into in May, 1921, to sell prospective rights to subscribe for shares of stock not in existence at the time of such contract, and is followed by a contract to purchase stock of the same company made within thirty days thereafter by one who also receives within thirty days after the first contract additional rights to subscribe by virtue of his stockholders, and the first contract is settled by delivery from the second contract, the loss is not such as comes within the perview of Section 214(a)(5) of the Revenue Act of 1921.

623 (g) A loss arising from a contract to sell at a fixed price, "when, as and if issued", certain rights to subscribe to shares of stock, and the satisfaction of such contract by the delivery of such stock purchased at a higher price is a loss incurred in a transaction entered into for profit and is deductible under the Revenue Act of 1921.

WHEREFORE, taxpayer respectfully prays that this Board may hear and determine his appeal.

WILLIAM H. VANSCHOTEN
Attorney for Taxpayer,
624 43 Exchange Place,
New York, N. Y.

Petitioner's Exhibit 6.

625

TAXPAYER'S EXHIBIT No. 1.

TREASURY DEPARTMENT

WASHINGTON

IT:PA-2

CRY-205-60D

Dec 21 1925

Mr. Eugene Higgins,
50 Union Square,
New York, New York.

626

Sir:

A reexamination of your income tax return filed for the year 1921, in connection with the recommendation of the Solicitor of Internal Revenue, discloses a deficiency in tax assessed amounting to $80,887.52 as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed 627 to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

Petitioner's Exhibit 6.

628 If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA-2: CRY-205-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR
629 Commissioner

By
Assistant to the Commissioner.

Inclosures:

Statements
Agreement—Form A Form 882

STATEMENT

IT:PA-2-60D Dec 21 1925

630 CRY-205

In re: Mr. Eugene Higgins,
50 Union Square,
New York, New York.

1921

Tax liability	$117,152.44
Tax assessed	36,264.92
Additional Tax Liability	$ 80,887.52

Petitioner's Exhibit 6. 631

The following is a synopsis of the income tax return for 1921 as now adjusted, after giving attention to the statements, shown in your brief, and produced at the oral hearing held in this office March 19, 1925, and to the opinion of the Solicitor, wherein the loss from the sale of stocks is computed as $474,083.01 instead of $486,554.87 as previously shown:

	2. Intere		$157,859.61	
	4. Rents		225,391.72	
Loss.	5. Business			$ 39,149.55
Loss	7. Sale of stocks			474,083.01 632
	8. Dividends		418,169.88	
	10. Other income		18,292.50	$513,232.56
			$819,713.71	
Less:	Losses		513,232.56	
			$306,481.15	
Taxes paid		$36,172.54		
16. Bad debts		450.00	36,622.54	
Total net income			$269,858.61	633

Dividends and exemption exceed the net income. No normal tax due.

	Surtax	$119,425.17
Less:		
	Tax paid at source	2,272.73
	Tax liability	$117,152.44

Petitioner's Exhibit 6.

634

STATEMENT

Mr. Eugene Higgins

Brought forward	$117,152.44
Tax assessed	36,264.92
Additional tax liability	$ 80,887.52

As power of attorney from you to Marshall Stearns and William H. Van Benschoton has been recorded in this office a copy of this letter and statement will be mailed
635 to them.

You are requested to disregard the letter and statement mailed you February 6, 1925.

CEG-shc-4

TAXPAYER'S EXHIBIT No. 2.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY
Office of the President
New York, N. Y., May 16, 1921.

636

To the Stockholders of the Delaware, Lackawanna and Western Railroad Company:

At a meeting of the Board of Managers held July 29, 1920, the following resolution was adopted:

"WHEREAS, at a special meeting of the stockholders of this Company, held on the 29th day of August, 1918, a resolution was duly adopted, authorizing the Board of Managers of the Company to sell, lease or otherwise dis-

637

pose of any of the real or personal property of the Company not taken over by the Government under the Federal Control Act, for such consideration and on such terms or in exchange for such stock of a corporation to which any such property might be transferred, as the Board should approve.

"NOW THEREFORE, BE IT RESOLVED:

"1. That the officials of this Company be, and they hereby are, authorized and directed to segregate the coal properties of the Company, and transfer and convey the same in such manner and for such consideration as shall be approved by the Executive Committee, to the end that the Company shall be divested of its ownership of said properties, and to take any and all steps, and to make, issue and deliver any and all deeds, leases, agreements, assignments, assurances of title or other instruments in writing that may be necessary to accomplish the desired result.

638

"2. That the officials of this Company be, and they hereby are, authorized and directed, upon the segregation, transfer and conveyance of said coal properties, forthwith to accept on behalf of the Company all of the provisions of the Constitution of the Commonwealth of Pennsylvania, and to take such steps and execute and file with the proper officials of the Commonwealth of Pennsylvania such documents as may be necessary to that end.

639

"3. That the Company shall (subject to the approval of the Interstate Commerce Commission first had and obtained pursuant to Section 20(a) of the Interstate Commerce Act, and in accordance with the statutes in such

610 case made and provided), upon the acceptance of the provisions of the Constitution of the Commonwealth of Pennsylvania as aforesaid, increase its capital stock by an amount equivalent to the surplus of the Company, or to such part of said surplus as the Interstate Commerce Commission may authorize to be transferred to the capital account of the Company, and thereupon issue and distribute, in the form of a stock dividend, such new stock, of a par value of $50 per share, to its stockholders pro rata according to their respective stock holdings at the time of such distribution.

611 "4. That the officials of this Company be, and they hereby are, authorized and directed to take any and all steps, and to make, execute and deliver any and all instruments in writing, that may be necessary to accomplish the issuance of said stock as aforesaid.

"5. That the President of this Company be, and he hereby is, authorized and directed to verify, sign and file an application on behalf of the Company to the Interstate Commerce Commission, and all documents required in support of such application, for the Commission's au-
612 thority for and approval of the issuance of such stock."

In compliance therewith an application for authority to increase the capital stock of the Company was duly filed with the Interstate Commerce Commission on September 15th last, and it has by order dated April 20th last approved of the issuance of Forty-five Million Dollars of additional capital stock. A special meeting of the stockholders will be held on July 21, 1921, of which due notice will be mailed to you, to authorize the proposed increase in the amount of our capital stock. If so approved by you a stock dividend of one hundred per cent. will be declared.

Petitioner's Exhibit 6.

643

A contract for the sale of the anthracite coal properties of the Company to the Glen Alden Coal Company has been prepared and will also be submitted to you at such special meeting for approval. The proposed consideration therefor is the sum of Sixty Million Dollars, with interest at four per cent., to be secured by a purchase-money mortgage upon the real estate conveyed.

By order of the Board of Managers,

W. H. TRUESDALE,
President.

644

TAXPAYER'S EXHIBIT NO. 3.

THE GLEN ALDEN COAL COMPANY.
Office of the President
Scranton, Pa., May 16, 1921.

To the Stockholders of the Delaware, Lackawanna and Western Railroad Company:

645

The Glen Alden Coal Company has offered the Delaware, Lackawanna and Western Railroad Company the sum of Sixty Million Dollars for its anthracite coal properties, to be paid as per terms of contract of sale, with interest at four per cent. A formal contract of sale has been prepared to be executed upon your approval. The Glen Alden Coal Company is a corporation of the State of Pennsylvania, incorporated in the year 1866. We propose to merge the Company with the Diamond Anthracite Coal Company, a Pennsylvania corporation which we also control, and, by action in conformity with the laws of

646 *Petitioner's Exhibit 6.*

the State of Pennsylvania, increase the number of shares of the capital stock of the merged Companies to eight hundred forty-six thousand (846,000) shares, of no par value. We shall offer this stock to the stockholders of The Delaware, Lackawanna and Western Railroad Company of record at the close of business June 15, 1921, on the basis of one share of Glen Alden Company stock for each share of Railroad Company stock, at Five Dollars ($5.00) per share, payable on or before August 20, 1921. Arrangements have been made with the Farmers' Loan and Trust Company, of the City of New York, to act as Transfer
647 Agents of the Company, and with the First National Bank of New York to act as Registrar of the stock of the Company. On or before June 20th next subscription blanks will be mailed to all stockholders of record June 15, 1921, for the number of shares to which they may subscribe, in accordance with the foregoing plan. This Company will be operated by officials now employed in the Coal Mining Department of your Company, the Vice-President and Manager of such Department having been selected as its President.

THE GLEN ALDEN COAL COMPANY,
By WILLIAM W. INGLIS,
President.

648

TAXPAYER'S EXHIBIT NO. 4.

THE GLEN ALDEN COAL COMPANY
Office of Secretary and Treasurer
Scranton, Pa.

June 18, 1921.

o the Stockholders of The Delaware, Lackawanna and Western Railroad Company:

We enclose herewith subscription blank for the number of shares of stock of the Glen Alden Coal Company to

Petitioner's Exhibit 6.

649

which we invite you to subscribe at Five Dollars per share. The attached blank must be signed by you and mailed in the enclosed envelope, or delivered to The Farmers' Loan and Trust Company, with New York draft or check for the amount named, on or before August 20, 1921. Temporary certificates of stock can be obtained on and after June 27, 1921, from the said Trust Company, pending our obtaining engraved permanent certificates. We beg to advise that the owners of The Glen Alden Coal Company have acquired a different charter than that outlined in our circular of May 16, 1921.

650

G. N. ENGLAND,
Secretary and Treasurer.

To the Farmers' Loan and Trust Company,
Transfer Agents for the Glen Alden Coal Company,
16-22 William Street, New York City.

The undersigned .....
hereby subscribes to shares of the capital stock of the Glen Alden Coal Company as follows: 651
Shares ..... Amount .....
being at the rate of Five Dollars per share and hereby encloses New York ..... in payment thereof.
(Check or Draft)

It is requested that a temporary certificate (or certificates) be issued therefor in the following denominations .....
.....
which you will please mail to the following address:
.....
.....

Petitioner's Exhibit 6.

652 WITNESS my hand and seal this ..... day of ..... A. D. 1921.

..... (L.S.)

In presence of

.....

653 STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM H. VAN BENSCHOTEN, being duly sworn, deposes and says: That he is the attorney for the taxpayer above named, and as such is duly authorized to verify the foregoing petition; that he has read said petition and is familiar with the statements therein contained; that the facts therein stated are true to the best of his knowledge, information and belief; that the sources of deponent's information and the grounds for his belief are the records of the taxpayer and the statements made to him by or on behalf of the taxpayer, and letters from
654 and other records of the Commissioner of Internal Revenue.

WILLIAM H. VAN BENSCHOTEN

Sworn to before me this }
18th day of February, 1926. }

HARRY H. WIGGINS
HARRY H. WIGGINS
Notary Public Nassau Co. N. Y.
Certificate filed in N. Y. Co. No. 718
N. Y. County Register's No. 6494
My Commission Expires March 30, 1926.

655

Petitioner's Exhibit 7.

UNITED STATES BOARD OF TAX APPEALS

EUGENE HIGGINS, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 12177.

656

AMENDED ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed herein, admits, denies and alleges as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition.

657

III. Admits that in the deficiency letter the respondent determined an additional tax liability for 1921 of $80,887.52. Denies that under taxpayer's allegations of error the whole amount is in controversy. If respondent's affirmative allegations in this amended answer are sustained, the amount in controversy is in excess of $250,000.00

V-First and Second. Admits the allegations contained in paragraphs V-First and Second of the petition.

Petitioner's Exhibit 7.

658

V-Third. Admits the sending of the circular as alleged in paragraph V-Third of the petition but denies that the effect of some of the language in such circular is as alleged in said paragraph Third.

V-Fourth, Fifth and Sixth. Admits the allegations contained in paragraphs V-Fourth, Fifth and Sixth of the petition.

V-Seventh. Admits that the total agreed consideration be paid on the contracts involved amounted to a total of
659 $98,273.00 but denies that no part of such amount was received by the taxpayer.

V-Eighth and Ninth. Denies the allegations contained in paragraphs V-Eighth and Ninth of the petition.

V-Tenth, Eleventh and Twelfth. Admits the allegations contained in paragraphs V-Tenth, Eleventh and Twelfth of the petition.

V-Thirteenth, Fourteenth and Fifteenth. Denies the allegations contained in paragraphs V-Thirteenth, Four-
660 teenth and Fifteenth of the petition.

V-Sixteenth. Admits the allegations contained in paragraphs V-Sixteenth of the petition.

V-Seventeenth, Eighteenth, Nineteenth, Twentieth, and Twenty-first. Denies the allegations contained in paragraphs V-Seventeenth, Eighteenth, Nineteenth, Twentieth and Twenty-first of the petition.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Petitioner's Exhibit 7.

661

VI. Denies that the propositions of law stated in paragraph VI of the petition are proper or applicable to the facts in the instant appeal.

VIII. For further answer to the petition filed by the taxpayer alleges that the deficiency of $80,887.52 as determined in the deficiency letter from which this appeal was taken, should be increased by including in taxpayer's income an item of dividends in the total amount of $733,911.75 and the tax recomputed on such basis. The facts in support of the additional item of income are as hereinafter alleged:

662

(a) The Delaware, Lackawanna & Western Railroad Company (hereinafter called the Railroad Company) for many years prior to September 1, 1921 operated coal mines as well as its railroad. By reason of the decisions in the United States Supreme Court reported in 213 U. S. 366 and 238 U. S. 516, it was required to segrégate and dispose of its coal business and coal properties.

(b) Several of the officers and employees of the Railroad Company were invited by it to promote a new coal company which should make an offer to the Railroad Company for the coal properties. On behalf of the new company the individuals refered to acquired an old coal charter, the name of which was changed to the Glen Alden Coal Company. All of the stock of this company was acquired, for a nominal consideration, in the names of these individuals.

663

(c) The Glen Alden Coal Company offered the Railroad Company $60,000,000.00 for all of the coal properties which offer was accepted by the Board of Managers of the Rail-

664 road Company and approved by its stockholders. The arrangement was all made with the understanding that the Glen Alden Coal Company would offer to the stockholders of the Railroad Company the right to subscribe to the stock in the Glen Alden Company on the basis of their stockholdings in the Railroad Company.

(d). The form of the agreement for the segregation and sale by the Railroad Company of all of its coal properties was approved by the Executive Committee, the Board of Managers and the stockholders of the Railroad Com-
665 pany. The coal business and coal properties were transferred by the Railroad Company to the Glen Alden Coal Company on September 1, 1921.

(e). During the months of May and June 1921 and for some years prior thereto Eugene Higgins the petitioner owned 20,529 shares of stock of the Railroad Company. As such stockholder he duly received certain notices and circulars from the Glen Alden Coal Company. Prior to August 20, 1921 the petitioner executed and forwarded to the Transfer Agents of the Glen Alden Coal Company his subscription blank together with his check subscribing for
666 20,529 shares of stock of the Glen Alden Coal Company, to which he was entitled to subscribe by virtue of being a stockholder of the Railroad Company. The petitioner enclosed with his subscription his check for $102,645.00 being at rate of $5.00 per share. Thereafter and during 1921 the petitioner received a stock certificate covering all the shares of stock of the Glen Alden Coal Company then owned by him. All the stockholders of the Railroad Company exercised their right to subscribe to the stock of the Glen Alden Coal Company.

Petitioner's Exhibit 7.

667

(f). The rights of the stockholders of the Railroad Company to subscribe to the stock of the Glen Alden Coal Company were quoted on the New York Curb Market as "Delaware, Lackawanna and Western Railroad Company Rights". Actual purchases and sales were made on the New York Curb Market beginning during the week of May 20, 1921 and continuing thereafter until approximately July 15th, 1921. At the time the petitioner constructively received from the Railroad Company his right to subscribe to the stock of the Glen Alden Coal Company such rights had a fair market value of $35.75 each. Taxpayer received 20,529 of such rights at a total value of $733,911.75.

668

(g). The earnings or profits of the Railroad Company since March 1, 1913 in excess of all dividends declared and paid by it during such time was in excess of $40,000,000.00. Such earnings or profits of the Railroad Company were available for distribution as dividends at the time taxpayer constructively received from the Railroad Company his rights to subscribe to the stock of the Glen Alden Coal Company.

(h). In taxpayer's return filed on or about March 14, 1922 no amount was included as a dividend (or other taxable amount of income) by reason of the transactions whereby the petitioner in 1921 (as a stockholder of the Railroad Company) became entitled to and did exercise a right to subscribe to 20,529 shares of stock of the Glen Alden Coal Company; neither was any such amount included in taxable income by the Commissioner in the deficiency letter from which this appeal was taken.

669

(i). In the deficiency letter from which this appeal was taken the respondent included in taxable income an item of

Petitioner's Exhibit 7.

670 $113,773.00, being the taxable profit on the sale of 3,100 rights constructively received from the Railroad Company to subscribe to the stock of the Glen Alden Coal Company. If the Board sustains the respondent's contention that the receipt of the rights constituted a dividend or other taxable amount, the item of $113,773.00 should be considerably reduced by computing the profit, on the sale by the petitioner of the rights, on a different basis; also the item of $773,911.75 above-referred to as representing the value of the rights received at the time of the receipt thereof, should be included in 1921 income. In the event the respondent's
671 contention is not sustained with respect to the taxability as a dividend or otherwise of the rights received, respondent moves that the deficiency determined by him in the letter from which this appeal was taken should be approved.

WHEREFORE, it is prayed that the appeal of the above-named taxpayer be denied and the deficiency increased in the manner above alleged.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

672

OF COUNSEL:
A. H. FAST,
HAROLD D. THOMAS,
Special Attorneys,
Bureau of Internal Revenue.

673

Petitioner's Exhibit 8.

UNITED STATES BOARD OF TAX APPEALS

EUGENE HIGGINS, Petitioner, against COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 66072

674

Your petitioner respectfully represents to this Honorable Board upon information and belief:

I.

Your petitioner is a citizen of the United States, residing temporarily in Paris, France, and having an office for the transaction of business at No. 50 Union Square East, New York, N. Y.

II.

675

Respondent, to wit, on the 12th day of March, 1932, by a written communication bearing that date, mailed to your petitioner a notice of deficiency in Federal Income Taxes for the calendar year 1929 in the sum or amount of $18,391.14. A true copy of said notice of deficiency is hereto annexed and marked Schedule A.

III.

In determining the aforesaid deficiency in taxes, for the entire amount of which your petitioner denies liability, respondent committed errors as follows:

Petitioner's Exhibit 8.

676

1. Respondent erred in finding that petitioner received interest in 1929 on an award for real estate condemned by The City of New York in the sum of $62,040.69, and taxpayer denies that the sum he so received as such interest was any sum in excess of $61,790.69, and alleges that of such interest so received he immediately paid to New York Manufacturers Real Estate Co., the tenant of the premises by assignment from Conrad Hubert, under a lease for ninety-nine years and twenty-five days, beginning December 6, 1905 and expiring January 1, 2005, the sum of $4,210., a portion of said interest to which said tenant
677 was entitled as a result of damage to his lease, resulting in the receipt of $57,580.69 net to petitioner, as interest on said award.

2. Respondent erred in including in taxpayer's gross income for 1929 the sum of $62,040.69, interest on an award for real estate condemned by The City of New York, and petitioner denies that any part thereof was taxable to him as income for the year 1929.

3. Respondent erred in finding that petitioner had for the year 1929 Capital Net Gain in the sum of $34,875.00
678 and petitioner denies that for the year 1929 he had a Capital Net Gain in any sum whatsoever, but in the event it should be held that petitioner had a Capital Net Gain for the year 1929, petitioner will claim that respondent erred:

(a) In not allowing in reduction thereof the sum of $12,000, being the sum paid to New York Manufacturers Real Estate Co., the tenant, by assignment from Conrad Hubert under a lease for 99 years and 25 days, beginning December 6, 1905 and expiring January 1, 2005, of the premises condemned, and on which respondent computed

679

said Capital Net Gain, to which said tenant was entitled as additional damages to his said lease; and

(b) In finding the value of the buildings condemned $90,000, instead of $9,000, and depreciation allowable $18,750, instead of $1,875.

4. Respondent erred in computing and finding a tax for the year 1929 in the sum of $4,359.38 against petitioner on Capital Net Gain and petitioner denies that he is liable for a tax in any sum whatsoever on Capital Net Gain.

680

5. Respondent erred in not allowing the sums $12,000 and $4,210, a total of $16,210, paid to New York Manufacturers Real Estate Co. as aforesaid, as a deduction for business expenses from petitioner's gross income.

6. Respondent erred in computing and finding a deficiency in income taxes for the year 1929 against petitioner in the sum of $18,391.14, and petitioner denies that he is liable for said sum or any part thereof.

IV.

681

The facts upon which your petitioner relies as a basis of this proceeding are as follows:

1. Petitioner received from The City of New York on June 5, 1929 the sum of $172,790.56 of which the sum $127,750.00 was an award for property condemned in August 1923 and the balance or $45,040.56 was in payment of interest on that award from August 1, 1923 to June 5, 1929.

Petitioner's Exhibit 8.

682

2. The premises condemned were a small part of practically an entire city block adequately improved with twenty-six brick buildings, which, together with other neighboring property, was subject to a lease for the period of ninety-nine years and twenty-five days beginning December 6, 1905 and ending January 1, 2005, originally made to one Conrad Hubert and subsequently assigned prior to the time the award was made to New York Manufacturers Real Estate Co.

683

3. That the New York Manufacturers Real Estate Co. claimed to be entitled to part of the said award made to petitioner and petitioner in settlement of that claim on the 5th day of June, 1929, paid to New York Manufacturers Real Estate Co. $12,000.00 of the award of $127,750.00 so received by him on that day and the further sum of $4,210.00 interest computed thereon from August 1, 1923 to June 5, 1929 out of the said sum of $45,040.56 for interest so received as aforesaid making a total payment to New York Manufacturers Real Estate Co. of $16,210.00.

684

4. Petitioner received from The City of New York on June 28, 1929 the sum of $64,000.13 of which the sum of $47,250 was an award for property condemned in August 1923 and the balance or $16,750.13 was in payment of interest on that award from August 1, 1923 to June 27, 1929.

5. That the premises taken by The City of New York for which the aforesaid awards were paid was a small portion of the block bounded by 11th and 12th Avenues and 43d and 44th Streets in the City of New York, all of which from March 1, 1913 to August 1, 1923, except the two 11th

Petitioner's Exhibit 8.

685

Avenue corners was owned by petitioner, improved with twenty-six brick buildings ranging from one to five stories in height, occupied and used for heavy manufacturing purposes and under a lease for ninety-nine years and twenty-five days beginning on December 6, 1905 and expiring January 1, 2005. That the value of the buildings owned by petitioner on said block was on March 1, 1913 $90,000.00 and that only 10% of said buildings in quantity and value were taken by The City of New York in the proceedings for condemnation aforesaid.

686

6. That said buildings depreciated since March 1, 1913 at the rate of 2% per year on the then value thereof.

7. That your petitioner received said premises bounded by 11th and 12th Avenues and 43d and 44th Streets in the City of New York, save for the said two 11th Avenue corners pursuant to the will of his father, the late Elias S. Higgins, who died on the 18th of August, 1889, and who had for many years prior thereto occupied the same as a factory for the making of carpets. On December 1, 1905 the entire premises were leased to one Conrad Hubert until January 1, 2005 and said Conrad Hubert and his assignee New York Manufacturers Real Estate Co. continued to hold and occupy the same until after August 1, 1923, and save for the parts thereof taken as aforesaid still occupies the same pursuant to said lease.

687

8. Your petitioner has always held and continues to hold said premises as a single business venture, the value of which on March 1, 1913 was in excess of $675,000. and that all sums which he has received as awards as aforesaid were but a restoration in part of principal and his investment therein.

688 *Petitioner's Exhibit 8.*

WHEREFORE, your petitioner prays that this Honorable Board may grant him a hearing; that it may redetermine the liability of your petitioner for income taxes for the year 1929; that in such redetermination it may find that your petitioner is not liable for any deficiency in income taxes for the year 1929 and that your petitioner may have such other and further relief in the premises as to this Honorable Board may seem just and equitable.

ORWILL V. W. HAWKINS,
Attorney for petitioner,
689 Office & Post Office Address:
No. 43 Exchange Place,
New York, N. Y.

Counsel:
DUER, STRONG & WHITEHEAD

EXHIBIT A.

NP-2-28

TREASURY DEPARTMENT

WASHINGTON

690 Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to

Mar 12 1932

Mr. Eugene Higgins,
50 Union Square,
New York, New York.

Sir:

You are advised that the determination of your tax liability for the year (x) 1929 discloses a deficiency of $18,391.14, as shown in the statement attached.

Petitioner's Exhibit 8.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. WILMER
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870.

694 *Petitioner's Exhibit 8.*

STATEMENT

IT:AR:A-1
MH-60D

In Re: Mr. Eugene Higgins,
50 Union Square,
New York, New York.

Year	Tax Liability	Tax Assessed	Deficiency
1929	$200,889.93	$182,498.79	$18,391.14

695

Net income reported on return (Ordinary net income)		$912,764.73
Add:		
1. Interest on award for real estate condemned by City of New York		62,040.69
Adjusted net income		$974,805.42
Capital net gain reported		None
2. Capital net gain corrected		$ 34,875.00

COMPUTATION OF TAX

696

Adjusted net income		$974,805.42
Less:		
Dividends	$691,359.41	
Personal exemption	1,500.00	692,859.41
Income subject to normal tax		$281,946.01
Normal tax at ½% on $4,000.00		$ 20.00
Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $273,946.01		10,957.84
Surtax on $974,805.42		186,621.08
Tax at 12½% on capital net gain of $34,875.00		4,359.38
Total tax		$202,038.30

Petitioner's Exhibit 8.

697

Mr. Eugene Higgins — Statement

Brought forward		$202,038.30
Less:		
Earned income credit	$ 4.37	
3. Income tax paid at source	1,144.00	1,148.37
Correct tax liability.		$200,889.93
Previously assessed		182,498.79
Deficiency		$ 18,391.14

EXPLANATION OF CHANGES

698

1. Interest of $62,040.69 on award made for real estate condemned by the City of New York, which amount was not originally reported, has been included as income. See General Counsel's Memorandum #10,043, published in Internal Revenue Bulletin Volume X, No. 51, page 2.

2. The profit on the real estate has been determined to be $34,875.00, as shown below:

March 1, 1913 values:		
Value of land		$585,000.00
Value of buildings		90,000.00
Total		$675,000.00

699

Total number square feet in plot	127,417
Total number square feet condemned by City of New York	29,943

Cost of property prorated

$\frac{29{,}943 \text{ sq. ft.}}{127{,}417 \text{ sq. ft.}} \times \$675{,}000.00 = \$158{,}625.00$

Value of buildings	$ 90,000.00
2% x $90,000.00 (depreciation)	$ 1,800.00
10 5/12 years (3/1/13 to 8/1/23) x $1,800.00	$ 18,750.00
Sale price	$174,750.00
Cost of property	158,625.00
Balance	$ 16,125.00

Petitioner's Exhibit 8.

700

Mr. Eugene Higgins	Statement
Brought forward	$ 16,125.00
Depreciation sustained	18,750.00
Total capital net gain	$ 34,875.00

3. Credit of $1,144.00 has been allowed for income tax paid at source on tax-free covenant bonds.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you
701 for the year 1929, the Income Tax Unit will be unable to afford you an opportunity to discuss your case before mailing formal notice of its determination as provided by section 272 (a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARSHAL STEARNS, being duly sworn, deposes and says
702 that he is one of the attorneys for the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to the matters he believes it to be true; that the reason why this verification is made by deponent and not by petitioner is that the petitioner is not within the United States, but is in Europe, where he is temporarily residing in Paris, France. That the sources of deponent's information and the grounds of his belief with respect to the matters herein alleged are based upon

Petitioner's Exhibit 8.

703

information obtained by deponent over a period of many years as petitioner's personal counsel and records of papers and proceedings mentioned and referred to in the foregoing petition.

MARSHAL STEARNS.

Subscribed and sworn to before me
this 9th day of May, 1932.

WILLIAM G. PHILLIPS,
Notary Public, Nassau Co., N. Y. 704
Certificate filed in N. Y. Co. No. 282.
N. Y. County Register's No. 4 - P - 109.
My Commission expires March 30, 1934.

(SEAL)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

I, GERARD T. SHEVLIN, a Notary Public in and for the County of Queens with certificate duly filed in the office of 705
the Clerk of the County of New York

DO HEREBY CERTIFY that I have carefully compared the annexed power of attorney dated the 9th day of October, 1928, from EUGENE HIGGINS to MARSHAL STEARNS of New Canaan, Connecticut, SELDEN BACON of the City, County and State of New York, HUGH MORGAN, JR., of West New Brighton, Richmond County, New York, and ORWILL V. W. HAWKINS of Lynbrook, Nassau County, New York, and the Consular Certificate of John R. Wood, Vice Consular of the United States of America at Paris, France, with the

706 original of said power of attorney and said Consular Certificate and find the same to be a true and correct copy of said power of attorney and said Consular Certificate and of the whole thereof.

WITNESS my hand and Notarial Seal this 9th day of May, 1932.

GERARD T. SHEVLIN,
GERARD T. SHEVLIN,
Notary Public, Queens Co. No. 1728.
707 Queens County Register's No. 6259.
Certificate filed with
N. Y. Co. Clk. No. 393, Reg. No. 3 S 289.
Kings Co. Clk. No. 334, Reg. No. 3940.
Commission expires March 30, 1933.

(SEAL)

KNOW ALL MEN BY THESE PRESENTS That I, EUGENE HIGGINS of 7 Place d'Iena, in the City of Paris, Republic of France, have made constituted and appointed, and by
708 these presents, do make, constitute and appoint MARSHALL STEARNS of New Canaan, Connecticut, SELDEN BACON, of the City, County and State of New York, HUGH MORGAN, JR., of West New Brighton, Richmond County, New York, and ORWILL V. W. HAWKINS, of Lynbrook, Nassau County, New York, or any of them, to be my true and lawful attorneys for me and in my name, place and stead, to execute and file in my behalf amended returns, reports, claims for abatement, claims for refund, claims for credit and any and all protests, claims and other papers or documents, which may in any way affect or have any connection with

Petitioner's Exhibit 8.

709

any and all income tax returns heretofore or hereafter filed by or for me and all income taxes at any time paid by me for the years covered by said returns or any additional income taxes claimed to be due under said income tax returns or on account of income taxes covered by said returns, under the provisions of the Revenue Laws or other Statutes of the United States, and to appear for me before the Commissioner of Internal Revenue of the United States and any Board, Bureau, Officers or other Representatives of the Government of the United States or of any of its Departments in connection with any of the aforesaid matters and to attend conferences, prepare and submit briefs and make arguments in my behalf in connection therewith, to take appeals on my behalf to the United States Board of Tax Appeals relating to the aforesaid and sign the petition on said appeal, and any and all documents in any way connected with said appeal, and to appear before said Board of Tax Appeals in my behalf, submit briefs, make arguments and do all and everything in any way connected or relating to such an appeal and to receive and collect refunds and reclaims arising out of any of the aforesaid matters.

710

711

For better and more effectually executing the powers and authorities aforesaid, to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do, if personally present at the doing thereof, hereby ratifying and confirming all that my said attorneys or any of them shall lawfully do or cause to be done by virtue hereof. This authority to remain in full force until revoked by me.

712 *Petitioner's Exhibit 8.*

IN WITNESS WHEREOF, I have hereunto set my hand and seal the Ninth day of October, in the year of Our Lord, one thousand nine hundred and twenty-eight.

EUGENE HIGGINS
L.S.

Consulate General of the United States
City of Paris, Republic of France } ss.:

713 BE IT KNOWN, That on this ninth day of October, Nineteen hundred and twenty-eight, at the American Consulate General of the United States of America, before me John R. Wood, Vice Consul of the United States of America, dwelling in the City of Paris, France, personally came and appeared Eugene Higgins, to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Consular Seal of the United States of America,
714 at the City of Paris, France, the day and year last above written.

JOHN R. WOOD
JOHN R. WOOD
Vice-Consul of the
United States of America at Paris France

11818
No fee prescribed

Stipulation Consolidating the Record. 716

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

B.T.A. Docket No. 80052
B.T.A. Docket No. 85961

The petitioner on review having heretofore duly filed his petition for review to the Circuit Court of Appeals 717
for the Second Circuit, and included therein his assignments of error, with respect to each of the above entitled proceedings, and all of the issues in one of said proceedings being identical with some of the issues in the other proceeding, it is hereby

STIPULATED AND AGREED that the proceedings in the above entitled appeals be consolidated for the purpose of record, briefing, hearing and decision and that the record on appeal consist of a single document entitled in both appeals, containing such matter as the parties by their praecipes may designate and consented that the Court enter its order herein to effect such purpose. 718

Dated, October 27, 1939.

O. V. W. HAWKINS
Attorney for Petitione on Review.
J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent on Review.

Approved:

LEARNED HAND
C. J.
Nov. 10, 1939.

718 **Praecipe for the Consolidated Record on Review of Decisions in Dockets Nos. 80052 and 85961.**

UNITED STATES BOARD OF TAX APPEALS

[SAME TITLE]

To the Clerk of the United States Board of Tax Appeals:

You will please transmit and deliver to the Clerk of
719 of the United States Circuit Court of Appeals for the Second Circuit copies duly certified as correct of the following documents and records in each of the above-entitled appeals, in connection with the petitions for review by the said Circuit Court of Appeals for the Second Circuit heretofore filed by the above-named petitioner on review, and now consolidated for the purpose of record, briefing, hearing and decision.

1. The docket entries of all the proceedings before the Board of Tax Appeals in Docket No. 80052 and Docket No. 85961.

720 2. The pleadings before the Board of Tax Appeals in Docket No. 80052 consisting of (a) petition for redetermination; (b) answer of respondent.

3. The pleadings before the Board of Tax Appeals in Docket No. 85961 consisting of (a) petition for redetermination; (b) answer of respondent.

4. Findings of fact and opinion of the Board of Tax Appeals.

Praecipe for the Consolidated Record on Review of Decisions in Dockets Nos. 80052 and 85961. 721

5. Orders and decisions of the Board fixing the deficiency in Docket No. 80052 and Docket No. 85961.

6. Petitions for review and assignments of error with notice of filing thereof, together with admission of service as endorsed thereon in Docket No. 80052 and Docket No. 85961.

7. Stipulation of facts dated April 28, 1938, with Exhibits A and B thereto annexed.

722

8. Statement of Evidence and Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 admitted in evidence at the trial.

9. Stipulation consolidating the record approved November 10, 1939 by Learned Hand, C. J.

10. This praecipe.

ORWILL V. W. HAWKINS,
Attorney for Petitioner.
Office & P. O. Address,
No. 15 Broad Street, 723
Borough of Manhattan,
New York City, N. Y.

Service of a copy of the foregoing praecipe is hereby admitted this 16th day of November, 1939.

J. P. WENCHEL
Attorney for Respondent on Review.

724 **Clerk's Certificate.**

UNITED STATES BOARD OF TAX APPEALS

WASHINGTON

[SAME TITLE]

Docket Nos. 80052 - 85961

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Ap-
725 peals, do hereby certify that the foregoing pages, 1 to 242, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 1st day of ~~January, 1940.~~ Dec 1, 1939

B. D. GAMBLE
Clerk,
726 United States Board of Tax Appeals.

[fol. 243] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1939

No. 223

Argued April 10, 1940 Decided May 6, 1940

EUGENE HIGGINS, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition by Eugene Higgins to review a decision of the Board of Tax Appeals redetermining deficiencies in income tax for 1932 and 1933. Affirmed.

Before L. Hand, Augustus N. Hand and Patterson, Circuit Judges

Orville V. W. Hawkins, for petitioner.
Samuel O. Clark, Sewall Key and Helen R. Carloss, for respondent.

[fol. 244] PATTERSON, Circuit Judge.

The point presented is whether the petitioner was entitled to deduct, for purposes of income tax, expenses incurred in caring for his investments in securities. He claims that the expenses were a proper deduction as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business," within the meaning of section 23(a) of the Revenue Act of 1932. The Board held that the deduction was not allowable.

The facts were found in detail by the Board. They come down to this: the petitioner has a fortune of $35,000,000 or more, part of it in real estate and part in stocks and bonds; he is not engaged in any business, unless the management of his fortune be deemed a business; he maintains an office in New York where several persons in his hire devote their time to supervision of the real estate and to collection of income from real estate and securities, and he also has an office in Paris, where he lives; he gives per-

sonal attention to his investments; in the years in question, 1932 and 1933, he did very little in the way of changing investments, making no sales and purchasing only four lots of tax-exempt bonds. In 1932 he paid $76,000 for salaries, rent and other expenses incident to running the offices, and in 1933 he paid $74,000 for similar items. In his income tax returns he claimed a deduction of these amounts from gross income, on the ground that they were expenses in carrying on a business and therefore deductible under section 23(a). The commissioner conceded before the Board that the part allocable to management of the real estate was a proper deduction. The Board found that somewhat more than two-thirds of the expenses were allocable to real estate. No complaint is made as to the allocation. The Board held that the petitioner was not carrying on business in respect to his investments in stocks and bonds and therefore disallowed deduction of that part of the expenses incurred in connection with the management of investments [fol. 245] in stocks and bonds. A tax deficiency for each year was determined accordingly.

The statute allows deduction of "the ordinary and necessary expenses paid * * * in carrying on any trade or business." In determining what Congress meant by the phrase "carrying on any trade or business," we take the words in their popular or received import. Maillard v. Lawrence, 16 How. 251, 261. By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business. He is generally spoken of as "retired" or "not in business." It is forcing the ordinary meaning of words to say that conserving or enhancing one's estate is carrying on a trade or business. The statute does not say that expenses paid or incurred in any business transaction may be deducted from gross income. It is narrower; it limits the deduction to expenses in carrying on a trade or business. We have no doubt that the attention which the petitioner gave to his investments in stocks and bonds did not amount to carrying on a trade or business, and that expenses paid in caring for such investments were not deductible from gross income. Whether the petitioner's expenses in connection with the management of the real estate were deductible is not before us.

The result we have reached is not to be reconciled with Kales v. Commissioner, 101 F. 2d, 35, in the Sixth Circuit.

It is in line, however, with our decision in Kane v. Commissioner, 100 F. 2d, 382, and with the holding of the Ninth Circuit in Miller v. Commissioner, 102 F. 2d, 476. In the Kane case we said: "There is no reason to suppose that the employment of a bookkeeper to keep accounts, or of a bank to make income collections, is more than a personal, as opposed to a business, expense" (page 383). The result is also in line with the concurring opinion of Mr. Justice Frankfurter in Deputy v. DuPont, 309 U. S. 488, at page 499.

Affirmed.

[fol. 246] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of May, one thousand nine hundred and forty.

Present Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Robert P. Patterson, Circuit Judges.

EUGENE HIGGINS, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 247] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Eugene Higgins v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 22, 1940. D. E. Roberts, Clerk.

[fol. 248] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 247, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Eugene Higgins, Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of June in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. Roberts, Clerk. (Seal.)

[fol. 249] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Blank Page

Blank Page

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SELDEN BACON,
Counsel for Petitioner.

Blank Page

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement of facts	3
Specification of errors to be urged	7
Reasons for granting the writ	8
Conclusion	12

Table of Cases Cited.

du Pont v. *Deputy*, 103 F. (2d) 257, 308 U. S. 488, 60 S. Ct. 363, 84 L. Ed. 313	9
Flint v. *Stone Tracy Co.*, 220 U. S. 107	10
Higgins v. *Helvering, Commissioner of Internal Revenue*, 39 B. T. A. 1005, 111 F. (2d) 795	1
Kales v. *Commissioner*, 101 F. (2d) 35	8

Statutes and Other Authorities Cited.

C. C. H. Fed. Tax Service (1934), Vol. 3, Par. 6035	11
I. T. 2579, X-2 C. B. 129 (1931)	11
I. T. 2751, XIII-1 C. B. 43 (1934)	11
Judicial Code, Section 240a, as amended by the Act of February 13, 1925	2
O. D. 537, 2 C. B. 175 (1920)	11
O. D. 877, 4 C. B. 123 (1921)	11
Revenue Act of 1932, Section 23(a)	3
Tariff Act of 1909	10

Blank Page

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Eugene Higgins prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered May 22nd, 1940, in the above entitled cause, affirming two orders of the United States Board of Tax Appeals.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 243) is reported in 111 F. (2d) 795. The opinion of the Board of Tax Appeals (R. 68-86) is reported in 39 B. T. A. 1005.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 22nd, 1940 (R. 245).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

The following questions are presented:

1. Where an individual, having large investments in both income-producing real estate and in securities, devotes his personal time and attention to the management, care and supervision of both types of investments, and necessarily maintains offices and employs salaried clerks to assist him in the activities incident thereto as a single and entire enterprise, does the Revenue Act of 1932 make a distinction between the general management expenses which, though undivided in themselves, were deemed attributable to the management of the real estate (which concededly are deductible as business expenses), and those deemed attributable to the management of the securities, and authorize the Commissioner to apportion the expenses of the undivided management and disallow any deduction for those he deems attributable to the management of the securities?

2. Cannot the management of investments in securities by the owner, when, in addition to his own personal constant supervision and control, the services and time of several employees is needed to carry on that management, be a "business" within the meaning of Section 23 (a) of the Revenue Act?

3. Does the Revenue Act make a distinction between the ordinary and necessary expenses of managing investments

in securities as a business, and those of managing investments in real estate as a business?

4. Where the management of investments in securities amounting to many millions of dollars would be business if conducted for hire by a third person for the owner, does the conduct of the same affairs cease to be "any * * * business" solely because conducted by the owner himself with the assistance of a staff of salaried employees?

Statute Involved.

The only statute applicable to the issues involved is Section 23 (a) of the Revenue Act of 1932, which reads as follows:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Statement of Facts

Petitioner is an American citizen, possessed of investments in real estate having an assessed value of over $11,000,000 (R. 135-145) and in securities consisting of stocks and bonds of an estimated value of over $25,000,000 (R.

125). For the purpose of managing these investments, petitioner more than forty years ago (R. 119, 128) set up a substantial business organization, which it costs him approximately $75,000 a year to operate (R. 50-51, 52-54). All of the petitioner's real estate, with the exception of two small unimproved plots, is located in the Borough of Manhattan, New York City, and consists of thirty different plots on which the improvements alone are assessed at $3,466,000 (R. 118, 135-145). His securities are kept in safe deposit boxes in New York City (R. 121-122). Petitioner has for many years resided at Paris, France, where he personally conducted his affairs and directed all details of the operation of his organization (R. 119-120, 125-126, 129, 148-199).

All details of petitioner's financial affairs are conducted through his New York office pursuant to his personal detailed instructions. His income consists of rents, dividends and interest, all paid to him at his New York office (R. 123).

In Paris, he has an office in a building separate from his dwelling consisting of several rooms equipped with cabinets, desks, typewriters and a library in charge of his private secretary (R. 114, 120, 127). Duplicate sets of his New York books of account are kept there (R. 128, 129).

In New York City he rents a suite of four offices staffed with a manager, a real estate man, an accountant, one consultant, and a clerk-stenographer (R. 114). This entire staff of the petitioner consists of salaried employees whose time (with the exception of that of one employee whose activities were confined to the real estate), was indiscriminately given to management of real estate and management of investments in securities.

The evidence to the personal management and control and personal direction by the petitioner of these investments is full and uncontradicted.

That the expenses which he claimed as a deduction from his gross income were usual, ordinary and necessary was undisputed.

That, so far as concerned his holdings of real estate, he was conducting a business within the meaning of the Act was conceded and held below (R. 79).

But the Board of Tax Appeals and the Circuit Court of Appeals supported the Commissioner in drawing a hitherto unknown distinction between the expenses of management of real estate and those of management of investments in securities and allowed a percentage of about two-thirds of his annual expenses as attributable to the management of his real estate, and decided that about one-third of his expenses in each year must be attributed to the cost of management of his securities; and that for so much of the expenses of the business so conducted by him as pertained to the investments in securities he should not be allowed a deduction; and this although the entire management under him was conducted in common by a single staff of salaried employees. The apportionment of the expenses (excepting the salary of a single employee whose time was practically entirely devoted to the real estate), was not based upon any positive evidence, but was estimated by the Board of Tax Appeals on the basis of the time supposed to be given to the one or the other. There is no pretense that there was any such actual division in the expenses as incurred.

No question has been raised as to the correctness of the apportionment so made, but that it was essentially a guess is apparent on every page of the record. No such actual division of the expenses for carrying on the business by salaried employees was or could reliably be made in the office operations.

Without burdening the court at this time with any detailed statement of this evidence, we may refer the court to the following pages of the record: 114-121, 123, 124,

127-130, 134, and 148-199, where all this is gone into in detail (See also pages 68-79).

The case presented is not one of letting others run his affairs, simply sitting back and merely receiving income from a capital managed by others. It is one of direct personal management of all his affairs giving daily attention to all its details, which are all controlled by him personally, though, owing to the magnitude and multiplicity of these affairs, he requires the services of salaried assistants subject to his orders.

That, in this case, attending to investments in securities amounting to upwards of twenty-five million dollars attained the dimensions of a business operation, is clearly established by the determination that the share of the ordinary and necessary annual office rents, expenses and salaries of employees held applicable to the management of these investments in securities (for which portion of the rents, expenses and salaries paid by him deduction is denied) amounted in one of the years under consideration to over $20,000 and in the other to over $17,000 (R. 50-54, 85-86, 87, 88).

It is conceded and found that he was engaged in business. It is also conceded and found that the expenses for which he claimed the rejected deduction were ordinary and necessary expenses paid by him.

The Commissioner and the court below have, however, taken the position that, while his management and care of his real estate was business, the management and care of his securities, though attaining such magnitude, was not "business"; and they accordingly have divided the expenses of operating his offices, consisting of salaries, rentals and miscellaneous general expenses, attributing just over two-thirds of these disbursements to the management of the real estate and the balance, substantially one-third, to the management of the investments in securities, allowing

the two-thirds as a proper deduction but refusing to allow as a deduction the one-third (substantially) of these same expenses, which the Commissioner and the court have deemed to be attributable to the management of his investments in securities.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In disallowing the claim of petitioner for deduction from his gross income of the ordinary and necessary expenses paid by him in connection with his personal management of his holdings of securities and new investments therein (R. 244, 245).

2. In holding that petitioner in his personal management of his various investments in real estate and in securities was not carrying on a business and entitled to deduct from his gross income all the ordinary and necessary expenses thereof (R. 243-245).

3. In holding that where the petitioner personally managed his entire estate, consisting partly of real estate and partly of investments in securities, all as a single unit, through regular offices maintained by him, and with the aid of a staff of salaried employees, the Revenue Law authorized a segregation of the actual ordinary and necessary expenses of his conduct of those affairs, between those deemed incurred in the management of his real estate and those deemed incurred in the management of his investments in securities, allowing the former as paid in carrying on business, and disallowing the latter as a deduction as not having been paid in carrying on business (R. 244-245).

4. In holding that the ordinary and necessary expenses paid by the petitioner in his personal care and management of his investments in securities, under the undis-

puted circumstances shown by the record, were not expenses of a business carried on by him (R. 244, 245).

5. In holding that "By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business. He is generally spoken of as 'retired' or 'not in business.' It is forcing the ordinary meaning of words to say that conserving or enhancing one's estate is carrying on a trade or business" (R. 244).

6. In holding that "the attention which the petitioner gave to his investments in stocks and bonds did not amount to carrying on a trade or business, and that expenses paid in caring for such investments were not deductible from gross income" (R. 244).

7. In affirming the decisions of the Board of Tax Appeals disallowing in each year the deduction of such part of petitioner's expenses of his business as it had held to be applicable to the management of his investments in securities (R. 244-45).

Reasons for Granting the Writ.

The decision of the court below is in direct conflict with decisions of other Circuit Courts of Appeal. This is expressly recognized in the opinion of the Circuit Court of Appeals herein from which we quote:

> "The result we have reached is not to be reconciled with Kales *v.* Commissioner, 101 F. (2d), 35, in the Sixth Circuit."

In *Kales* v. *Commissioner*, 101 F. (2d) 35, decided by the Circuit Court of Appeals for the Sixth Circuit on January 12, 1939, the taxpayer was a woman possessed of large holdings in securities and real estate, which she personally

managed. Basing its opinion solely upon taxpayer's personal management of her properties, the court decided that she was in doing so carrying on business, and entitled to have her expenses in connection with the management of all her properties, whether real or personal, deducted from her gross income, as business expenses under Section 23 (a) of the Revenue Act.

In *du Pont* v. *Deputy*, 103 F. (2d) 257, decided by the Circuit Court of Appeals for the Third Circuit on March 28, 1939, Mr. du Pont had two offices with seven or eight employees, the expenses of maintaining which were over $36,000. He had large holdings in securities to the management of which he devoted 50% more or less of his time. Question was raised whether certain expenses of the taxpayer were ordinary and necessary expenses paid by him in carrying on his business. They had been held by the Circuit Court of Appeals to be such, and were allowed by it as a deduction from taxpayer's gross income.

The case then came to this Court. Its decision is reported in 308 U. S. 488; 60 S. C. 363, 84 L. Ed. 313. In this Court three opinions were written.

The prevailing opinion, by Justice Douglas, held that the particular expenses in question were not ordinary and necessary expenses, and took the position that it was consequently unnecessary to determine whether Mr. du Pont in the management of his securities was carrying on business.

Justice Frankfurter wrote a short concurring opinion, joined in by Justice Reed, taking the position that the case ought to be disposed of on the ground that Mr. du Pont was not carrying on business, and that the decision below ought to be reversed on that ground.

Justice Roberts wrote a dissenting opinion, joined in by Justice McReynolds, supporting the position taken by

Judge Maris in the court below that Mr. du Pont was engaged in business.

The question whether the personal management of a vast fund of securities was doing business was thus left open by this Court in the *du Pont* case (four justices expressing divergent opinions concerning that question, and the majority of the Court ruling that the question was not really presented). In the case at bar the question, thus left open in the *du Pont* case, is squarely brought up.

The matter involves determination of the meeting of the words "any * * * business" in the Act. Two Circuit Courts of Appeal, those for the Third and Sixth Circuits, have held that the personal management by the taxpayer of his investments in securities, involving large expense, is carrying on a "business." In the case at bar the Circuit Court of Appeals for the Second Circuit has held that it is not a "business" within the meaning of the Act, though carried on as part of the management of his entire estate, much of which was real estate, and its management concededly a business in which the petitioner was engaged.

It should not pass unnoticed that Congress in enacting the Revenue Act said "any trade or business," evidently giving to the word "business" a wider meaning than was involved in the word "trade." And it is *any* business.

Is it not reasonably to be urged, that Congress in so adding the words "or business," preceded as it was by the word "any," used the word "business" with a meaning as wide as that which this Court had but a couple of years before attributed to that word in construing its use in the provisions of the Tariff Act of 1909 imposing an income tax on corporations?

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 169-171.

The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is statedly on its face irreconcilable with the decision of the Circuit Court of Appeals for the Sixth Circuit in the *Kales* case. It is also in conflict with the ruling of the Circuit Court of Appeals for the Third Circuit in the *du Pont* case, which this Court found it unnecessary to pass upon.

The decision at bar is also in conflict with the long continued practice of the Bureau of Internal Revenue, of allowing the deduction of the expenses of management of investments in securities as business expenses.

O. D. 537, 2 C. B. 175 (1920);
O. D. 877, 4 C. B. 123 (1921);
I. T. 2579, X-2 C. B. 129 (1931);
I. T. 2751, XIII-1 C. B. 43 (1934);
1934 C. C. H. Fed. Tax Service, Vol. 3, Par 6035.

To these rulings of the Bureau might well be added the further unreported precedents that for the years from 1913 to 1931 no objection was raised by the Commissioner to the allowance as a deduction to this particular taxpayer of all the expenses of his personal management of his estate, without distinction between his investments in real estate and his investments in securities; and in the Commissioner's 60-day letter concerning the 1932 tax he sought only to disallow expenses proportionate to the income from tax-exempt securities (R. 21 and 112). And it was only at the trial before the Board of Tax Appeals that this theory was abandoned and the theory advanced that the deduction should be limited to those pertaining to real estate (R. 110-112).

The question presented has never been passed on by this Court and the situation is not only one of legal construction of the Act on a point where the Circuit Courts of Appeal differ in opinion, but also one frequently pre-

sented. And the question is squarely presented by the record in this case.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted and the question set at rest by this Court.

Respectfully submitted,

SELDEN B. CON,
Attorney for Petitioner.

(8928)

Blank Page

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 4 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 253.

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

SELDEN BACON,
ORWILL V. W. HAWKINS,
Attorneys for Petitioner.

SELDEN BACON,
Of Counsel.

Blank Page

INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
QUESTIONS PRESENTED	9
STATUTE INVOLVED	11
SPECIFICATION OF ERRORS TO BE URGED	12
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I.—The rulings assigned as error and here sought to be reviewed are rulings of law	16
II.—Prior decisions have been that whether a taxpayer in managing his own securities was carrying on business was a question of fact to be determined on the basis of whether the taxpayer's activities were continuous, extensive, varied, and regular. The decision now under review practically rejects that doctrine, and, in substance, holds that, totally irrespective of such tests, as a matter of law, no taxpayer can be held to be carrying on business in managing his own investments in securities, however extensive, continuous and regular his activities may have been	22
III.—The management of this entire great estate constituted a single "business" of the petitioner within the meaning of that word as used in Section 23 (a) of the Revenue Act of 1932	37
IV.—The true meaning of the word "business" in this section is that declared by this Court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, shortly before the passage of the Revenue Law of 1913	40
V.—Section 23 (a) itself distinguishes between expenses incurred in the course of isolated transactions, and like expenses incurred in the usual course of the regular conduct of a business	48

PAGE

VI.—The Act contains no suggestion that continuous and regular transactions in the management of a large amount of securities, which when performed by one to whom that business was farmed out would be business, the expenses of which he would be entitled to deduct from his own income, shall cease to be business when conducted by the owner of the securities for his own profit 50

VII.—Where a single business is conducted by the taxpayer as an entirety involving large ordinary and necessary expenses for rental of offices and salaries of assistants necessary to the operation of that business, nothing in the Act authorizes either the Commissioner, or the Board of Tax Appeals, or the Courts, to sever those expenses and say that a percentage thereof shall be disallowed as a deduction because a corresponding percentage of the business, regularly conducted by the taxpayer for forty years, consists of the management of his securities and reinvestment thereof and the collection of the income therefrom 52

VIII.—The ordinary and popular meaning of the term "any trade or business" is broad enough to include the management of one's own securities if that management involves the elements of constant attention and care instead of mere sporadic transactions 55

IX.—The history of the legislation and its administration strongly support the construction of the statutory provision concerning the deduction for which we contend 57

X.—The decision of the Circuit Court of Appeals should be reversed, and the deductions claimed of $20,270.89 for the year 1932 and of $16,087.44 for the year 1933 allowed 62

APPENDIX—Successive Revenue Acts 63

Table of Cases and Statutes, Etc.

DECISIONS CITED.

PAGE

Alverson v. *Commissioner*, 35 B. T. A. 482 ..... 23, 58

Bachofen von Echt v. *Commissioner*, 21 B. T. A. 702 .... 23, 58

Bachofen von Echt v. *Commissioner*, 27 B. T. A. 1419 .. 23, 58

Baker v. *Commissioner*, 17 B. T. A. 733 ..... 45, 59

Barney v. *Commissioner*, 36 B. T. A. 446 ..... 23, 58

Bedell v. *Commissioner*, 30 F. (2d) 622 35

Brewster v. *Gage*, 280 U. S. 327 60

Burnet v. *Clark*, 287 U. S. 410 23

Cecil v. *Commissioner*, 100 F. (2d) 896 ..... 16, 61

Chaloner v. *Helvering*, 69 F. (2d) 571 45

City Bank Farmers Trust Co. v. *Commissioner*, 112 F. (2d) 457 ..... 32, 36

Croker v. *Commissioner*, 27 B. T. A. 588, 592 ..... 23, 30, 39, 54, 57, 59

Crooks v. *Kansas City Ass'n.*, 37 F. (2d) 83 45

Dalton v. *Bowers*, 287 U. S. 404 23

Deering v. *Blair*, 23 F. (2d) 975 59

Deputy v. *Du Pont*, 308 U. S. 488 ..... 28, 29, 40, 61

Du Pont v. *Deputy*, 103 F. (2d) 257 ..... 23, 28, 36

Elliott v. *Commissioner*, 15 B. T. A. 494 59

Eysenbach v. *Commissioner*, 10 B. T. A. 716 ..... 45, 59

Eysenbach v. *Commissioner*, VII—2, C. B. 12 ..... 45, 59

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 171 ..... 20, 24, 40, 41, 43, 44, 45, 46, 56, 59, 61

PAGE

Foss v. *Commissioner*, 75 F. (2d) 326 50

Heilbroner v. *Commissioner*, 34 B. T. A. 1200, 1201 .... 23, 24

Helvering v. *Bliss*, 293 U. S. 144 ..... 46, 60

Helvering v. *Winmill*, 305 U. S. 79 ..... 46, 60

Higgins v. *Helvering*, 39 B. T. A. 1005 1

Higgins v. *Helvering*, 111 F. (2d) 795 1

Kales v. *Commissioner*, 101 F. (2d) 35 ..... 20, 23, 25, 26, 27, 35, 41, 44, 46, 50, 58, 60, 61

Kane v. *Commissioner*, 100 F. (2d) 382 ..... 23, 25, 29, 35

Kenan v. *Bowers*, 48 F. (2d) 263 58

Kissel v. *Commissioner*, 15 B. T. A. 1270 ..... 23, 57

Knox as Executor, 3 B. T. A. 143 ..... 39, 53

McFeely v. *Commissioner*, 296 U. S. 102 60

Miller v. *Commissioner*, 102 F. (2d) 476 ..... 23, 27, 28, 29, 35, 50, 61

Ostenberg v. *Commissioner*, 17 B. T. A. 738 57

Pinchot v. *Commissioner*, 113 F. (2d) 718 ..... 6, 20, 42, 43, 45

Pyne et al. Executors v. *United States*, 35 Fed. Supp't. 81 ..... 30, 33, 34, 44, 45

Roebling v. *Commissioner*, 37 B. T. A. 82 58

Rogers v. *United States*, 41 F. (2d) 865 ..... 23, 45

Schwinn v. *Commissioner*, 9 B. T. A. 1304 23

Sears, Roebuck & Co. Ass'n. v. *Commissioner*, 45 F. (2d) 506, 508 45

PAGE

Sloan v. *Commissioner*, 63 F. (2d) 666, 669 45

Stephenson v. *Commissioner*, 101 F. (2d) 33 23

Trustees of White v. *Commissioner*, ...F. (2d) 34, 36

Walker v. *Commissioner*, 63 F. (2d) 351 23

Wallace's Estate v. *Commissioner*, 101 F. (2d) 604 ..... 11, 61

Washburn v. *Commissioner*, 51 F. (2d) 949 ..... 16, 59

Watson et al.; Trustees v. *Commissioner*, 35 B. T. A. 706 ..... 39, 53

Wilson v. *Eisner*, 282 F. 38 59

STATUTES CITED.

Judicial Code, Sec. 240 (a) 2

Corp. Tax Law of 1909 57

Rev. Act of 1913, Sec. II, B 46, 47, 53, 63

Rev. Act of 1916, Sec. 5 63

Rev. Act of 1918, Sec. 214 (a) 45, 64

Rev. Act of 1921, Sec. 214 (a) 64

Rev. Act of 1924, Sec. 214 (a) 65

Rev. Act of 1926, Sec. 214 (a) 65

Rev. Act of 1926, Sec. 303, (e) 42

Rev. Act of 1928, Sec. 23 (a) 65

Rev. Act of 1932, Sec. 23 (a) 11, 37, 40, 48, 66

Rev. Act of 1934, Sec. 23 (a) 66

Rev. Act of 1936, Sec. 23 (a) 66

Rev. Act of 1938, Sec. 23 (a) 66, 67

ANNOUNCEMENTS OF RULINGS BY THE COMMISSIONER

PAGE

I. T. 2751, XIII-1 C. B. 43 ..... 18, 19, 58

O. D. 537, 2 C. B. 175 57

O. D. 877, 4 C. B. 123 57

C. C. H. Fed. Tax Service (1934), Vol. 3, Sec. 6035 ..... 18, 58

"ACQUIESCENCES" BY COMMISSIONER.

Alverson v. *Commissioner*, 1937, 1 C. B. 1 58

Barney v. *Commissioner*, 1939, 1 C. B. 3 58

Croker v. *Commissioner*, 1933, XII—1 C. B. 4 ..... 30, 39, 54, 57, 59

Elliott v. *Commissioner*, 1929, VIII—2 C. B. 15 59

Kissel v. *Commissioner*, 1929, VIII—2 C. B. 28 57

Watson et al., Trustees v. *Commissioner*, 1937, 1 C. B. 27 53

Blank Page

Blank Page

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 253

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit, here brought for review, is reported in 111 F. (2d) 795; and appears in full in the printed record, at pages 243-245.

The opinion of the Board of Tax Appeals, reviewed by the Circuit Court of Appeals is reported in 39 B. T. A. at page 1005, *et seq.*; and is printed in full at pages 68 to 86 of the printed record.

The opinion of the Board of Tax Appeals contains a lengthy statement of the facts found by it, and of its legal conclusions therefrom; and its two brief orders dealing with the income tax deficiencies assessed against the petitioner for the years 1932 and 1933, respectively, are printed in the record at pages 87 and 88. The petitioner's two appeals to the Board of Tax Appeals, which brought up like question of carrying on business during the two years 1932 and 1933, were consolidated by that Board and disposed of in the one opinion.

The facts were, to a considerable extent, stipulated (R. 48-67), and as to the rest the evidence was uncontradicted (R. 109-238).

The opinion of the Circuit Court of Appeals on the consolidated cases, disposing of both the petitions for review of the orders of the Board of Tax Appeals, refers to the detailed findings of fact by the Board, briefly summarizes them, and states its decision on the questions presented.

Its order, disposing of both the petitions for review and affirming the decisions of the Board of Tax Appeals, was entered on May 22nd, 1940, and is printed in full on page 245 of the record.

Jurisdiction of This Court.

This Court has jurisdiction of the cause under the provisions of Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13th, 1925; and directed issue of certiorari, bringing the cause here for review by it, on October 14th, 1940.

Statement of the Case.

Petitioner is an American citizen, possessed of investments in New York real estate having an assessed value of over $11,000,000 (R. 135-145), and in securities consisting of stocks and bonds of a value exceeding $25,000,000 (R. 125). For the purpose of managing these investments, petitioner over forty years before the years in question (R. 71 and 76) set up a substantial business organization, ever since maintained by him, which it was costing him approximately $75,000 a year to operate (R. 50-51, 52-54).

The petitioner's real estate, with the exception of two small unimproved lots, was located in the Borough of Manhattan, New York City, and consisted of some thirty different plots on which the improvements alone were assessed at $3,466,000 (R. 118, 135-145). His securities were kept in safe deposit boxes in New York City (R. 121-122). Petitioner had for many years resided at Paris, France, where he personally conducted his affairs and directed all details of the operation of his organization (R. 119-120, 125-126, 129, 148-199).

All details of petitioner's financial affairs were conducted through his New York office pursuant to his personal detailed instructions. His income consisted of rents, dividends and interest, all paid to him at his New York office (R. 123).

In Paris, he had an office, in a building separate from his dwelling, consisting of several rooms equipped with cabinets, desks, typewriters and a library in charge of his private secretary (R. 114, 120, 127). Duplicate sets of his New York books of account were kept there (R. 128, 129).

In New York City he rented a suite of four offices staffed with a manager, a real estate man, an accountant, one consultant, and a clerk-stenographer (R. 114). This entire staff of the petitioner consisted of salaried employees whose time (with the exception of that of one employee whose activities were practically confined to the real estate), was indiscriminately given to the management of the taxpayer's real estate and to the management of his investments in securities (R. 70-78).

The taxpayer had organized this method of conducting his affairs in 1889 (R. 76), and even the routine of its administration under the petitioner's orders had been carried on without substantial change since about 1902 (R. 71).

In 1932 the petitioner personally selected and purchased $675,000 of new securities, and in 1933 $1,052,000 of new securities (R. 73).

The evidence to the constant personal management and control and personal direction by the petitioner of all his investments is full and uncontradicted and is largely sustained by the finding that he was in practically daily communication by cable, radio and mail with his New York office (R. 69-78). The character of his personal investigation and decisions as to his investments in securities appears in Exhibit 5 (R. 148-199); and these documents were unquestioned.

It was undisputed that the expenses which he claimed as a deduction from his gross income were ordinary and necessary. The Commissioner, in fact, before the matter came before the Board of Tax Appeals, held that all the expenses for which the petitioner claimed a deduction from his gross

income were ordinary and necessary expenses of his business of managing his own estate, but disallowed a percentage of them, on the ground that a corresponding percentage of the taxpayer's gross income was derived from tax-exempt securities, such as United States and State bonds; holding that the total expenses incurred should be prorated according to the amount of income derived respectively from exempt and non-exempt sources, disallowing the same percentage of the expenses as the non-taxable gross income bore to the petitioner's total gross income (R. 21).

This theory proving untenable (R. 84), the Commissioner asserted for the first time, before the Board of Tax Appeals, the theory (sustained alike in this case by the Board of Tax Appeals and by the Circuit Court of Appeals), that, while in managing his real estate investments the petitioner admittedly was carrying on business, in the associated active management of his own investments in securities, in the same offices and with the services of his same staff of salaried employees, he was not carrying on business (R. 83-84, 244).

The method of disposing of the question by allowing a percentage of the total expenses paid, on the ground that that percentage pertained to the management of the petitioner's real estate, and disallowing a percentage of them, on the sole ground that that percentage of them pertained to the management of his securities, involved the determination that all the expenses so divided were ordinary and necessary.

The items in dispute appear in detail by a comparison of the part of the opinion of the Board of Tax Appeals appearing on pages 85 to 86 of the Record, with the part of the

stipulation of facts before that Board appearing on pages 49 to 54 of the Record.

The items here in question, which were disallowed as deductions on the sole ground that the taxpayer in managing his securities was not carrying on business, were:

For the year 1932	$20,270.89 and
For the year 1933	$16,087.44

No question is made for either year over the disallowance of certain small items for services and disbursements with respect to admittedly personal matters, amounting in 1932 to $2,613.04 and in 1933 to $1,127.75.

In each year a part of the taxpayer's income exceeding the amount of the respective deductions so denied was taxed at the rate of fifty-eight per cent, so that the amount of taxes assessed and directly involved in this case is:

For 1932	$11,757.12
For 1933	$ 9,330.72

The facts that, in so far as concerned the management of his holdings of real estate, the petitioner was carrying on business within the meaning of the Act, and that all the expenses thereof claimed were ordinary and necessary, was admitted by the Commissioner and specifically held by the Board of Tax Appeals (R. 84). No question was made of that holding of the Board before the Circuit Court of Appeals (R. 244). And in a subsequent case that Court has held that similar management of large holdings of real estate was carrying on business.

Pinchot v. *Commissioner*, 113 F. (2d) 718.

The Board of Tax Appeals and the Circuit Court of Appeals supported the Commissioner in drawing a distinction between the expenses of the petitioner's management of his real estate, and those of his management of his investments in securities, and allowed a percentage of about two-thirds of his annual expenses as attributable to his business of managing his real estate, and decided that the other one-third of the same expenses in each year must be attributed to the ordinary and necessary cost of management of his securities; and that for so much of the expenses of the business so conducted by him as pertained to the management of the investments in securities he should not be allowed a deduction, solely because of the nature of such investments (R. 84, 244); and this although the management under him of his entire estate, real and personal had been conducted in common without modification of the system, by a single staff of salaried employees for over thirty years, of which period ten years were prior to the enactment of the Revenue Act of 1913.

The apportionment of the expenses (excepting the salary of a single employee whose time was practically entirely devoted to the real estate and whose entire salary was allowed as a deduction), was not based upon any positive evidence, but was estimated by the Board of Tax Appeals on the basis of the approximate amount of time estimated as given by his employees to the real estate and to the securities respectively.

No question is here raised as to the mere correctness of the ratio so used in apportioning the expenses, if they could be apportioned by what was essentially a guess. That it was such a guess is apparent on the face of the opinion of

the Board of Tax Appeals (R. 68-86) and throughout the evidence (R. 109-238). No such actual division of the expenses of carrying on the business in rented offices by salaried employees was made in the daily operation of the taxpayer's business (R. 125).

The case presented is not one of the taxpayer's letting others run his affairs, simply sitting back and merely receiving income from a capital managed by others. It is one of direct personal management of all his affairs, the taxpayer himself making every decision, giving constant and practically daily attention to all its details, which were all controlled by him personally; though, owing to the magnitude and multiplicity of his affairs, he required the services of salaried assistants, who worked subject to his orders and to his constant personal supervision.

That, in this case, managing investments in securities amounting to upwards of twenty-five million dollars attained the dimensions, regularity and continuity of carrying on business, is clearly established by the determination that the share of the ordinary and necessary annual office rents, expenses and salaries of employees applicable to the management of these investments in securities (for which share of the rents, expenses and salaries paid by the petitioner deduction has been denied) amounted in one of the two years under consideration to over $20,000, and in the other to over $16,000 (R. 50-54, 85-86, 87, 88).

The Commissioner (after shifting his position before the Board), the Board of Tax Appeals and the Court below have each taken the position that, while his management and care of his real estate was carrying on business, his like management and care of his securities carried on in

the same offices and with the assistance of the same staff of clerks, though attaining such magnitude and having the petitioner's constant personal attention and decision, was not "carrying on business".

They accordingly have divided the expenses of operating his offices, consisting of salaries, rentals and miscellaneous general expenses, attributing two-thirds of these disbursements (and the entire salary of one assistant whose work was practically exclusively on real estate matters) to the management of the real estate, and the remaining one-third (other than the one man's salary) to the management of the investment in securities, allowing the two-thirds as a proper deduction, but refusing to allow as a deduction the one-third of these same expenses which one-third the Commissioner, the Board and the Court below have alike deemed to be attributable to the petitioner's active management of his investments in securities, disregarding completely the fact that such expenses were part of the cost of that part of his income, even if he were not carrying on business in that respect.

Questions Presented.

The main question presented is: whether the owner of some twenty-five million dollars of securities as well as some eleven million dollars worth of real estate (nearly all improved) who personally, with the assistance of a staff of salaried employees ever since 1902 and during the two years involved, 1932 and 1933, has been actively managing his vast estate, and who, admittedly, was engaged in carrying on business in so far as concerned the

management of his real estate, was also, as far as concerned the concurrent management of his securities in the same offices and by the same salaried employees, engaged in "carrying on business" within the meaning of the Revenue Law of 1932; where the entire management of all his estate was conducted by him as an entity, through the same offices and the same staff of salaried employees, under his own constant almost daily supervision and direction (R. 72), and with no differentiation made in the management of these affairs between time spent by his employees in connection with the management of one part of his property or the other, save as a single one of his staff (Dietz) was actually occupied, practically exclusively, with real estate matters, and full deduction of his (Dietz) salary accordingly allowed.

A second question presented is whether, on an estimate of how much of the time of the petitioner's staff was spent in connection with the management of the real property and how much in connection with the management of the securities, the statute authorizes division of the expenses (concededly ordinary and necessary and paid during the taxable year) in the management of his great property, which for over 30 years had been conducted as a single entire business; and says that the petitioner's management of the real estate was carrying on business, and his concurrent management of his securities by the same staff in the same offices, and all under the petitioner's constant personal direction, was not carrying on business; allowing the amount of those expenses deemed to pertain to the management of the real estate as a proper deduction, and refusing any deduction for the percentage of the

same expenses deemed incurred in the concurrent management of his securities?

The main question presented simmers down to the precise meaning of the words "carrying on any trade or business", as used in Section 23, (a) of the Revenue Act of 1932.

It can hardly be questioned that if the management of this vast property had been farmed out to a third person that management would constitute the carrying on of "business" by such third person and he would be entitled to deduct his own necessary and ordinary expenses of conducting it from his own income.

Wallace's Estate v. *Commissioner,* 101 Fed. (2d) 604.

Does the statute authorize a differentiation, as matter of law, either between different individuals conducting such business for profit, or between the kinds of property handled by the taxpayer in managing his own affairs?

Both these differentiations have been made in the case at bar in the decision below, and they are each essential to sustaining that decision.

Statutes Involved.

The only statute directly involved is Section 23, and its Subdivision (a) of the Revenue Act of 1932 (Act of June 6, 1932, Cap. 209, Sect. 23, (a) 47 Stat. at Large) which reads as follows:

"In computing net income there shall be allowed as deductions:

"(a) Expenses. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; travelling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

This Section, as far as concerns the questions here presented, has been unchanged in substance since 1913. What slight changes there have been have grown little by little out of the provisions of Section II, B. of the Revenue Act of 1913. The text of the corresponding sections of the successive acts will be found in the Appendix to this brief.

Specifications of Errors Urged.

The Circuit Court of Appeals erred:

1. In disallowing the claim of petitioner for deduction from his gross income of the ordinary and necessary expenses found to have been paid by him in connection with his active personal management of his holdings of securities and new investments therein (R. 244, 245).

2. In holding that petitioner in his personal management of his various investments in real estate and in securities was not carrying on an entire business and that

the petitioner was therefore not entitled to deduct from his gross income all the ordinary and necessary expenses of the entire business so conducted by him paid by him during the year (R. 243-245).

3. In holding that, where the petitioner personally managed his entire estate, consisting partly of real estate and partly of investments in securities, all as a single unit, through regular offices maintained by him, and with the aid of a staff of salaried employees and giving that business practically daily personal attention, and having his finger on every piece of business (R. 72), the Revenue Law authorizes a segregation of the actual ordinary and necessary expenses of his conduct of those affairs, between those deemed incurred in the management of his real estate and those deemed incurred in the management of his investments in securities, allowing the former as expenses paid in carrying on business, and disallowing the latter as a deduction as not having been paid in carrying on business (R. 244-245).

4. In holding that the ordinary and necessary expenses paid by the petitioner in his personal care and management of his investments in securities, under the undisputed circumstances shown by the record, were not expenses of a business carried on by him (R. 244, 245).

5. In holding that: "By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business. He is generally spoken of as 'retired' or 'not in business'. It is forcing the ordinary meaning of words to say that conserving or

enhancing one's estate is carrying on a trade or business" (R. 244).

6. In holding that "the attention which the petitioner "gave to his investments in stocks and bonds did not amount to carrying on a trade or business, and that expenses paid in caring for such investments were not deductible from gross income" (R. 244).

7. In affirming the two decisions of the Board of Tax Appeals disallowing in each year the deduction of such part of petitioner's expenses of his business as it had held to be applicable to the management of his investments in securities (R. 244-245).

Summary of the Argument.

1. The rulings assigned as error are rulings of law.

2. Prior varying decisions of the question here presented have been decisions of the fact whether the taxpayer's activities in the particular case in connection with his management of his securities were so continuous, extensive, varied and regular as to amount to carrying on business.

The decision of the Court below at bar has rejected that test, and holds that no taxpayer can be held to be carrying on business in managing his own investments in securities, however extensive, continuous and regular his activities may have been.

3. The management of this petitioner's entire great estate constituted a single business within the meaning of the Revenue Act.

4. The true definition of the word "business" in the Act is that given to that word by this Court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, two years before the original passage of the Revenue Act.

5. Section 23(a) itself distinguishes between expenses of isolated business transactions and expenses of like transactions incurred in "carrying on a business".

6. The Act authorizes no distinction among the persons who carry on a business of managing a great mass of securities between persons who manage securities belonging to others and persons who carry on the business of managing their own securities.

7. The Act does not authorize severance of a legitimate entire business by the Revenue authorities and rejection of part of the ordinary and necessary expenses thereof paid during the year.

8. The ordinary and popular meaning of "any trade or business" is broad enough to include the management of one's own securities if that management involves the elements of constant attention and care instead of merely isolated transactions.

9. The administration of the Revenue Act in accordance with our contentions for twenty years and more

during which this provision has been substantially repeatedly reenacted makes applicable the rule declared by the Court in *Helvering* v. *Winmill*, 305 U. S. 79, 83, that, "Treasury regulations and interpretations long continued without substantial change applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law".

POINTS AND AUTHORITIES.

I.

The rulings assigned as error and here sought to be reviewed are rulings of law.

Where, as here the evidentiary facts as to the taxpayer's activities and the nature thereof are undisputed, the conclusion that the activities shown do, or do not, amount to "carrying on business" involves a construction of the Section and a conclusion of law that is reviewable by the courts.

Cecil v. *Commissioner*, 100 F. (2d) 896, 900;
Washburn v. *Commissioner*, 51 F. (2d) 949, 951.

A. The Ruling of the Board of Tax Appeals.

The Board of Tax Appeals also stated, in substance, that its conclusion was not based on any determination of the extent of the activities of the petitioner in connection with his holdings of securities or of their regularity or conti-

nuity. It followed an entirely different proposition of law, when it said:

> "To allow the deductions claimed in the present proceeding and to disallow them as was done in *Kane* v. *Commissioner, supra*, would be to make a distinction between the small investor and one investing like the petitioner upon a very large scale, for the nature of the expenses disallowed by the Commissioner is the same in both cases. We cannot make distinctions merely because of the extent of investments or of expenses commensurate therewith" (R. 83).

That was, in substance, a refusal to pass on the question whether the activities of the taxpayer in relation to his investments in securities were so regular, continuous and active as to constitute "carrying on business"; and a determination that, because the expenses of this taxpayer in connection with his securities were of the same general character as a might be the merely occasional ones of a small investor in securities, whose activities were isolated and occasional only, the present taxpayer, as matter of law, cannot be engaged in "carrying on any business" though his activities have every characteristic of a regular business and have been conducted on the large scale shown ever since 1902.

Section 23(a) distinctly says that ordinary and necessary expenses are to be allowed as deductions when they are expenses of "carrying on business", and does not allow deduction of identical expenses without other proof that they are part of the cost of specific items of income, when they are not expenses of "carrying on business."

That makes the precise distinction between the small investor having only occasional isolated matters to attend to, and the investor whose activities are on so large a scale that they require continual attention and daily care, so constant and continuous that they become the "carrying on of business."

Where the transactions are isolated or sporadic the proofs must show, pursuant to the established procedure of the Bureau, that the particular expenses for which credit is sought were part of the ordinary and necessary cost of securing particular items of income reported.

I. T. 2751, XIII-1 C. B. 43;
1934 C. C. H. Fed. Tax Service, Vol. 3, Sec. 6035.

The section itself recognizes that expenses of the same general nature may be established in the case of "carrying on business" by general proof that they are the "ordinary and necessary expenses paid or incurred during the taxable year" in carrying on that business.

It is the multiplicity of recurrent items and the continuous, regular and active attention required that make the difference between having occasional isolated transactions of a business nature, the expenses of which are not allowed as deductions under this section without further proof, and "carrying on business" the ordinary and necessary expenses of which are to be allowed as a deduction by the express terms of this section, without additional proof.

The real explanation of the distinction made by Section 23 (a) is probably this:

In cases of isolated transactions of income reported, the taxpayer is required to make proof of the cost of securing each of those particular items, and such costs are allowed upon the production of such proofs.

I. T. 2751, XIII C. B. 43.

But in the case of a taxpayer having such a multiplicity and continuity of transactions as to constitute carrying on business, the preservation and production of such proofs would not only impose a great expense on the taxpayer but it would also impose a heavy burden on the officials of the Revenue Bureau, who would be required to check each such item independently. Under those circumstances, Congress provided the common-sense rule that, where the transactions were so numerous and continuous that they constituted carrying on a trade or business, all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on such trade or business might be proven annually in lump form, so relieving not only the taxpayer but also the officials of the Revenue Bureau of a great burden of labor.

The Board's ruling was thus erroneous in law.

B. The Ruling of the Circuit Court of Appeals.

The Circuit Court of Appeals said in this case:

> "By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business. He is generally spoken of as

> 'retired' or 'not in business.' It is forcing the ordinary meaning of words to say that conserving or enhancing one's estate is carrying on a trade or business" (R. 244).

And it again indicated that its determination was based on the conclusion of law that a taxpayer could not be "carrying on business" in managing his investments in securities, no matter how extensive, constant or regular his activities were in connection therewith, when it said:

> "The result we have reached is not to be reconciled with *Kales* v. *Commissioner,* 101 F. (2d) 35 (6th Circuit)" (R. 244).

That remark could properly be made only if it were recognized that a different rule of law was being adopted in the case at bar from that adopted in *Kales* v. *Commissioner.* Different conclusions of fact in different cases on differing evidence are not themselves irreconcilable. It is only a difference in the law applied to the facts that makes two decisions irreconcilable.

About two months after its decision in the case at bar, the Circuit Court of Appeals for the Second Circuit, in a subsequent case, held that the active management of one's own real estate on a large scale was "carrying on business" within the Revenue Act, citing the definition of business by this Court in *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, in support of its ruling, and adding:

> "Our decision in Higgins v. Commissioner, 2 Cir. 111 F. (2d) 796, did not touch the question of real estate management as a business."

Pinchot v. *Commissioner,* 113 F. (2d) 718, 719.

The decisions below, both of the Board of Tax Appeals and of the Circuit Court of Appeals, further involve the ruling that the Board may differentiate between activities of a taxpayer on the ground of the nature of the investments which he has, holding that if these investments are in securities their management, though taking equally constant time, attention and activity and involving equal expense, cannot be deemed "carrying on business", though the like activities and like expenses in managing real estate owned by the taxpayer will be deemed "carrying on business"; thus differentiating between kinds of property managed by the taxpayer.

We find no provision in the statute authorizing any such distinction between kinds of investments.

Both the ruling of the Board and the ruling of the Circuit Court of Appeals also involve holding that the Commissioner and the Board and the Courts are permitted to differentiate between individuals conducting like activities for profit, on the ground that what is "carrying on business" in the case of a person who handles another's securities, is not "carrying on business" in the case of the person who owns the securities which he handles. We find no provision for such a distinction between persons in the statute. We discuss this proposition below under Point VI.

Both these differentiations have been made in the case at bar and both are essential to the decisions reached below.

II.

Prior decisions have been that whether a taxpayer in managing his own securities was carrying on business was a question of fact to be determined on the basis of whether the taxpayer's activities were continuous, extensive, varied, and regular.

The decision now under review practically rejects that doctrine, and, in substance, holds that, totally irrespective of such tests, as a matter of law, no taxpayer can be held to be carrying on business in managing his own investments in securities, however extensive, continuous and regular his activities may have been.

A distinction was long ago drawn between cases where the taxpayer actually carried on the business of managing his estate, and cases where the taxpayer did not (either personally or by employee or agent) take any active part in its management, but farmed out that work, so that the mere receipt of income from securities, in the absence of such continued management, was held, as matter of fact, not to constitute a carrying on of business by the taxpayer.

There followed accordingly a series of rulings, both by the Board of Tax Appeals and by the courts, passing on the question whether the activities of a particular taxpayer in handling his securities were so continuous, extensive, varied and regular as to sustain, as matter of fact, the contention that the taxpayer was actually engaged in carrying on business in managing his securities.

Schwinn v. *Commissioner*, 9 B. T. A. 1304;
Alverson v. *Commissioner*, 35 B. T. A. 482;
Bachofen von Echt v. *Commissioner*, 21 B. T. A. 702, reversed on rehearing, 27 B. T. A. 1419;
Croker v. *Commissioner*, 27 B. T. A. 588, 592;
Kissel v. *Commissioner*, 15 B. T. A. 1270;
Barney v. *Commissioner*, 36 B. T. A. 446;
Miller v. *Commissioner*, 102 F. (2d) 476, 479;
Kales v. *Commissioner*, 101 F. (2d) 35, 39;
Kane v. *Commissioner*, 100 F. (2d) 382;
Rogers v. *United States*, 41 F. (2d) 865;
Walker v. *Commissioner*, 63 F. (2d) 351;
Stephenson v. *Commissioner*, 101 F. (2d) 33.

And as suggesting the same rule, Circuit Courts of Appeal have also cited the following decisions of this Court as tending to support the same doctrine.

Dalton v. *Bowers*, 287 U. S. 404;
Burnet v. *Clark*, 287 U. S. 410.

The four most recent decisions of the Circuit Courts of Appeals rendered prior to the one at bar on this subject are: the *Heilbroner* case, 34 B. T. A. 1200, affirmed under the title of *Kane* v. *Commissioner*, 100 F. (2d) 382; the *Kales* case, 101 F. (2d) 35; the *Miller* case, 102 F. (2d) 479; and *DuPont* v. *Deputy*, 103 F. (2d) 257.

In the *Heilbroner* case, the Board of Tax Appeals held:

> "The evidence shows that petitioner was a widow who, upon her husband's death, received a substantial estate, mostly in securities. She had no business experience. She placed some of her securities

with a trust company to collect the income, and paid the trust company $583.13 as its charge or commission for such service. Her brother had an individual office and a secretary or bookkeeper. Petitioner's accounts and affairs were to some extent looked after by this secretary, and, by arrangement with her brother, petitioner paid $1,200 as her proper share of the secretary's compensation and the office rent. This she deducted on her return, and the Commissioner disallowed the deduction.

* * * * * *

"Petitioner was not carrying on any trade or business. Even the 'very comprehensive term' referred to in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, does not reach her for, as shown by this evidence, there was nothing about which petitioner was employed and nothing that occupied her time, attention, or labor for livelihood or profit. She did not manage her estate or direct its management. She merely received income from investments, and this is not a trade or business."

34 B. T. A. 1201.

This decision of the Board of Tax Appeals was sustained by the Circuit Court of Appeals for the Second Circuit in the case of *Kane* v. *Commissioner* (Mrs. Kane being the former Mrs. Heilbroner), the Circuit Court of Appeals saying:

"While we do not say that the taxpayer might not carry on a business through an agent, it was not shown here that enough was done either by the taxpayer or her agents to constitute the carrying on of a business. * * * The activities of the taxpayer's brother as to her investments and the employment for personal convenience of a bookkeeper to record financial transactions, or of a bank to cut

and collect coupons, did not, in our opinion, amount to the carrying on of a business."

Kane v. *Commissioner,* 100 F. (2d) 382, 383.

In that case both the Board of Tax Appeals and the Circuit Court of Appeals proceeded on the theory that whether the activities of the taxpayer in regard to management of her own securities were so great and so continuous as to amount to her carrying on business, was a question of fact, and not a question of law as to the nature of her investments; and in that case they resolved that question of fact against the taxpayer.

The second case was that of *Kales.*

In the *Kales* case, the Board of Tax Appeals wrote:

> "The instant case is similar to the *Kissel* case in two respects. Here, as there, the taxpayer is a woman of substantial means and, as in that case, one of the questions involved is whether her activities in connection with the use of her property constituted the carrying on of a trade or business within the meaning of section 23 (a), *supra.* In the *Kissel* case, we were satisfied from the evidence and the testimony of record that the activities of the taxpayer were such as to constitute the conduct of a trade or business within the meaning of the statute. It is thus apparent that even under the theory of the *Kissel* case the deductibility of the fees in the instant case is dependent upon a determination that the activities of this petitioner in respect of the income involved in the refund suits constituted the conduct of a trade or business.
>
> * * * * * *
>
> "In the instant case there is no showing that the petitioner associated herself actively in any of the

> enterprises in which she held securities or that she devoted any of her time to the work of those enterprises as a matter of business or in any way other than in the collection of whatever dividends or interest might be due or owing on the securities held. * * * * Her only activity shown by the record was the receipt of dividends paid. * * * She stated from the witness stand that she knew nothing about bonds, but gave her approval to the lists of securities submitted by her attorneys. The only other activity in this connection so far as the record shows, was a request that in so far as possible, the bonds be purchased through a firm with which her niece's husband was connected."
>
> *Kales* v. *Commissioner,* 34 B. T. A. 1046, 1054, 1055.

One member of the Board had dissented, he "being of opinion that petitioner's activity in the premises was such as to constitute a trade or business," ibid, pp. 1058-1059.

That decision of the Board was reversed by the Circuit Court of Appeals for the Sixth Circuit in 101 F. (2d) 35, where the Court said:

> "Concluding that there are cases where the activities of taxpayers are such that though they invest but their own capital they are none the less carrying on a business, we think that Mrs. Kales' activities bring her deductions within the permissible scope of the statute. While the petitioner's endeavor to make proof of her activities during the earlier years of the period 1916 to 1930 was somewhat curtailed by the view of the examining board member that, since the questions related to expenses for the years 1928 and 1930, activities of those years only

were important, there is sufficient evidence in the record, however, and quite enough likewise in the evidentiary findings of the Board, to show her general activity in relation to her affairs during the entire period. She had an arrangement with her lawyers by which her books were kept by the firm's head bookkeeper, first with one assistant and later with two. For this service she paid the firm $3,000 a year. She visited the office set aside for her to confer with the bookkeeper three or four times a week, signed all checks personally, except when absent from the city, and made all decisions affecting either her sale or purchase of securities. * * * It would be impossible in the brief space of an opinion and serve no useful purpose to detail all her activities. It is sufficient to say that they were extensive, varied, continuous and regular, and in no substantial manner to be distinguished from the activities of the taxpayer in the Kissel and von Echt Cases, and in that of Bula E. Croker v. Commissioner, 27 B. T. A. 588, cited by the dissenting Board member."

Kales v. *Commissioner,* 101 F.(2d) 35, 39.

It is to be noted that the decision of the Circuit Court of Appeals in the *Kales* case is again based on the determination as matter of fact of the question whether the activities of the taxpayer were so "extensive, varied, continuous and regular" as to amount to her carrying on business in respect to her management of her own securities.

The third important case of the same character is that of *Miller* v. *Commissioner,* 102 F. (2d) 476, where the Circuit Court of Appeals for the Ninth Circuit ruled:

"Other cases have recognized that though the taxpayer takes no part in the enterprises as to which

he is an investor, he may nonetheless be considered to be carrying on a business if the transactions concerning his investments are substantial and frequent as distinguished from occasional or isolated. Dalton v. Bowers, 287 U. S. 404, 53 S. Ct. 205, 77 L. Ed. 389; Burnet v. Clark, 287 U. S. 410, 53 S. Ct. 207, 77 L. Ed. 397; Rogers v. U. S., Ct. Cl., 1930, 41 F. 2d 865; Walker v. Commissioner, 3 Cir. 1933, 63 F. 2d 351, affirming 20 B. T. A. 937; Stephenson v. Commissioner, 6 Cir., 101 F. 2d 33, January 11, 1939; Schwinn v. Commissioner, 9 B. T. A. 1304; Kissel v. Commissioner, 15 B. T. A. 1270; Bachofen von Echt v. Commissioner, 21 B. T. A. 702; Alverson v. Commissioner, 35 B. T. A. 482; Barney v. Commissioner, 36 B. T. A. 446. In addition to the cases cited, two Circuit Court cases have very recently been decided which applied, in ascertaining the character of the taxpayer's investment activities, the test of the extent of those activities. We think that these two cases, taken together, establish a proper measure for the determination of whether a taxpayer's activities are of a 'business' character."

Miller v. *Commissioner*, 102 F. (2d) 476, 479.

In the case of *Du Pont* v. *Deputy*, 103 F. (2d) 257, the Circuit Court of Appeals for the Third Circuit held that the activities of the taxpayer in regard to securities owned by him were such as to constitute carrying on business.

This Court, on writ of certiorari, reversed the decision in that case on the ground that the particular expenses involved were not ordinary and necessary; the majority of this Court holding that it was unnecessary in that case to determine whether the activities of the taxpayer amounted to carrying on business or not.

Justices FRANKFURTER and REED, however, held, in a concurring opinion, that they did not amount to carrying on business (308 U. S. 499); while Justices ROBERTS and MCREYNOLDS held, in a dissenting opinion (308 U. S. 502), that they did amount to carrying on business.

During the period prior to 1939, there had been other cases proceeding on the same question of fact as to the extent and continuity of the taxpayer's activities in managing his securities. It had always until the present case been regarded as a question of fact to be determined on that basis.

If the unquestioned activities of the petitioner in the present case in regard to his investments in securities in conjunction with his real estate did not amount to carrying on business, what is the element lacking that could exist?

In the present case, when the opinion below is analyzed, the proposition was held by the Court below to be one of law: That no amount of continuous activities on the part of the taxpayer relating to securities he owns, can amount to "carrying on business."

The Circuit Court of Appeals in the opinion at bar refers to its own decision in the *Kane* case and also to the decision of the Circuit Court of Appeals for the Ninth Circuit in *Miller* v. *Commissioner,* 102 F. (2d) 476, as supporting its present ruling.

Neither of these cases seems to us either to sustain or proceed on the proposition of law advanced below in the case at bar.

Each of those two former decisions proceeded expressly on a determination of *fact* that the activities of the tax-

payer in the particular case were not, in fact, so extensive and continuous as to amount to carrying on business; while, either expressly or in substance, admitting that activities involved in managing one's own securities might amount to "carrying on business" if the transactions concerning investments were substantial, regular and frequent as distinguished from occasional or isolated.

As we have pointed out under Point I, the ruling of the Circuit Court of Appeals in the case at bar proceeds on the theory that managing one's own securities can not be "carrying on business" no matter how regular, frequent, substantial and continuous the taxpayer's activities are. (See Point I, *supra.*)

The Circuit Court of Appeals in the case at bar said further:

> "By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business. He is generally spoken of as 'retired' or 'not in business.' It is forcing the ordinary meaning of words to say that conserving or enhancing one's estate is carrying on a trade or business" (R. 244).

Other tribunals have held a different view.

> *Croker* v. *Commissioner,* 27 B. T. A. 588, 592; id. XII-1 C. B. 4;
> *Pyne et al. Executors* v. *United States,* 35 Fed. Suppt. 81.

If a man held only one long term security which needed no attention save cutting off a single coupon twice a year

and depositing it, and he had given up his former activities in some other line of business to retire and live on his savings, one might naturally speak of him as "retired." His activities in such case would have none of the recognized characteristics of "carrying on business," there being no extensive, various, continuous or regular activity, while the personal activities which had earlier been his business had been abandoned.

That is not the case here. In this case the taxpayer had been carrying on, ever since 1889, for over forty years before the years here involved, this business of managing his own great estate, giving to it his personal constant attention (R. 71-72), making all decisions about his investments (R. 72), and since 1902 (R. 71), had been carrying it on without even material change in the details of his system, and in daily communication with his New York office by letter, by cable and by radio (R. 72).

In 1932 he selected and purchased securities to the amount of $675,000 (R. 73). In 1933 he selected and purchased securities to the extent of $1,052,000 (R. 73). And the selection of the securities and the decision to make the purchase had in every instance been his own (Exh. 51, R. 148-199).

A man who has been actively personally managing a great fortune successfully in that way for a period of over fifty years continuously, is hardly to be spoken of as having been "retired" or "not in business" during all those years. When had he retired? And from what had he retired? There is not a suggestion in the record of any diminution of the activities in which he had been engaged since 1889, or of any different activities prior to that date.

Any person managing so extensive a fund as a farmer for the owner of such an amount of securities would be said to be quite actively engaged in business. Some of us, as executors or trustees, have had the management of large funds and know what such management requires; and that success in that business can be attained only by constant care and attention.

The decision below is not to be sustained by rulings that are in conflict with the terms of the Revenue Act, which by its provision for deduction of the expenses of "any trade or business" carried on by the taxpayer, forbids any discrimination because the property the taxpayer is managing is his own; and likewise, by saying "any business," forbids any discrimination based on the particular nature of the investments he is engaged in managing, whether in realty or personalty.

If any such differentiation is to be made it should be by amendment of the Act and not by attempting to read into the Act provisions that are not there, and which are in contravention of the broad words of the Act itself—"any trade or business."

Since the decision below, now under consideration, there have been three decisions bearing more or less directly on some of the questions here presented.

The first of these was the decision of the Circuit Court of Appeals for the Second Circuit in *City Bank Farmers Trust Company* v. *Commissioner*, 112 F. (2d) 457. The City Bank in that case, as Trustee of trusts under the will of Angier B. Duke, deceased, for the benefit respectively of A. N. Duke and Angier B. Duke, Jr., sought a deter-

mination of over-assessment of income taxes for 1931, because in that year it had paid itself commissions on capital as Trustee, which it had failed to deduct in making its return of the income of the beneficiaries of its trusts. Its commissions for receiving and paying out income had been previously allowed.

That case proceeded chiefly on the proposition that while the Trust Company was itself carrying on a business in administering the trusts, and, in computing its individual income taxes, could properly claim deductions for its ordinary and necessary expenditures in administering the trusts, it could not *as a trustee* be carrying on business, and the beneficiaries of the trust were not carrying on business because *they* were merely passive recipients of income.

The second of these cases, decided October 7, 1940, is the case of *Pyne et al., Executors* v. *United States*, 35 Fed. Supp't. 81. This was a case before the United States Court of Claims in the decision of which the four judges of that Court concurred.

In that case, the estate was one of approximately thirty-five million dollars. The executors, as the Court found, had powers in the administration of the estate to an extent almost equal to that of the decedent during his lifetime.

The testator died shortly before the Stock Market crash of 1929 and the subsequent depression. The executors maintained an office and employed a manager and six or seven other employees. The value of the investments of the estate so greatly declined before the estate was fully administered that the attorney testified: "It looked like

the estate was almost going to be wiped out." Only one of the executors "had had any practical business experience and his had not been of a sort to enable him to cope with the Herculean task of conserving this $35,000,000 estate in these cataclysmic times."

The claim presented was for the deduction of certain attorney's fees paid in 1934 from the income of that year.

> "The attorney's services consisted chiefly in advising the executors on steps to be taken which would best conserve the estate, as to what investments to dispose of, and in what other property to invest the proceeds, in advising the management of the corporations in which the estate had investments as to the steps to be taken to conserve their property and escape loss. In doing so, certainly this attorney was engaged in business, and we have no doubt the executors were likewise engaged in business, in the business of conserving the estate and protecting its income."

The deduction was allowed by the Court.

Pyne et al. Executors v. *United States*, 35 Fed. Supp't. 81.

The third decision was that in *Trustees of Carl H. White, deceased,* v. *Commissioner,* decided by the Circuit Court of Appeals for the Third Circuit on October 9, 1940. , Fed. (2d)

In that case the Court wrote:

> "It seems now to be clear that the investing and reinvesting of assets, either by an individual for himself or by trustees on behalf of a trust estate, is

> pretty definitely determined not to constitute the carrying on of business."

In asserting that proposition, that Court seems not only to have made a rather incomplete examination of the authorities, but also to have fallen into the same confusion of thought which we have already pointed out in the decision now under review, between, on the one hand, cases holding merely that the limited particular facts in a given case did not establish the carrying on of business, and, on the other hand, the rule adopted in the case at bar, that, *as matter of law,* the management of securities cannot under any circumstances amount to carrying on business; for the Court cites *Miller* v. *Commissioner,* 102 F. (2d) 476; *Kane* v. *Commissioner,* 100 F. (2d) 382, and of the *Kales* case says merely: "It seems to look the other way."

As we have already pointed out, neither the *Miller* case nor the *Kane* case sustains any such proposition of law, but each of them proceeds on the finding of fact that the activities shown in the particular case did not have the necessary continuity, etc., required to amuont to carrying on business.

Kales v. *Commissioner,* 101 F. (2d) 35, had also followed the rule that it was a question of fact, reaching, on the facts shown in that case, the conclusion that what was shown did amount to carrying on business.

The Third Circuit Court also cited *Bedell* v. *Commissioner,* 30 F. (2d) 622. That case very clearly went off on the decision of fact that the taxpayer in question, whatever might have been the case in other years, was not conducting any business of the kind he claimed during the year there in question.

In its opinion in the *White* case, the Circuit Court of Appeals for the Third Circuit also cited the present case and *City Bank* v. *Commissioner,* 112 F. (2d) 457, which we have just mentioned.

The Third Circuit Court, in the *White* case (with a completely changed personnel), made no reference whatever to its own previous decision in *Du Pont* v. *Deputy,* 103 F. (2d) 257, where all the Judges of that Court had held that "the plaintiff's business was primarily that of conserving and enhancing his estate," as had also been found as a fact by the District Court. The *Du Pont* case, of course, subsequently came to this Court, and while four of the Justices here gave divergent opinions on the question whether Mr. Du Pont was engaged in carrying on business, the Court itself left untouched that finding of the Courts below.

No one of those three cases had presented such a question as is here presented, where the taxpayer had, for many years before the adoption of the income tax amendment and the enactment of the 1913 Revenue Act, as well as ever since, carried on his present business of conserving and managing his own estate, and protecting its income, an estate consisting of large amounts of real estate and large amounts of securities owned by him, as a single entire business; recognized by the term "any business" in the Act, adopted while his "business" was and for many years had been active; and where he admittedly was engaged in carrying on business; but the decision arbitrarily divides his single business of managing his estate into two, holding that so much of the expenses of that business which the Court attributed to the management of his securities

could not be deducted as expenses of carrying on a business, even though they were obviously costs incurred by him in realizing the income from those securities, in continuous, regular and varied activities in the business of conserving his estate and protecting its income.

It would be an extraordinary construction of the Act that would result in holding that expenses incurred in isolated transactions of collecting income have to be credited in order to ascertain the amount of "income" realized, while refusing like credit of expenses of collecting income where the transactions were so continuous, regular and varied as to have all the characteristics of "carrying on business."

III.

The management of this entire great estate constituted a single "business" of the petitioner within the meaning of that word as used in Section 23 (a) of the Revenue Act of 1932.

The expenses now in question for which deduction was asked and has been disallowed, included nothing for personal compensation of the taxpayer. They were simply for a portion of the rental of his offices in New York and of the salaries of his staff of employees, and of minor expenses of his offices in New York and Paris such as stationery, telegrams and postage, etc., and some items of legal expense connected therewith, paid by him during each of the years. That they all came directly within the provisions of the Act (except for the percentage of them disallowed because attributed to the management of the petitioner's securities),

was not only conceded, but also determined by the allowance of the percentage of all these items that was held applicable to the management of the real estate.

We are brought face to face with the question whether the personal active management of his vast affairs constituted "carrying on business" by the taxpayer.

When the Act was first passed, in 1913, this taxpayer had been carrying on this business of managing his entire estate since 1889 (R. 76), and without any substantial change even in the details of the system of operation since 1902 (R. 71).

As already pointed out (*supra*, pp. 3, 4) the management of his entire properties was throughout the years carried out by his staff of salaried employees under his own constant personal supervision and direction, without discrimination between the time given day by day to real estate or securities (save only as one of the staff, Dietz, had practically to do only with real estate, and his full salary was allowed as a deduction). As to the salaries of the other members of the staff, and the office rentals and miscellaneous office expenses, these were not kept separate in any way by the taxpayer (R. 125); and the Board and the Circuit Court of Appeals made a guess that two-thirds of them pertained to the management of the real estate and one-third of them to the management of the securities, allowing the two-thirds as a deduction and disallowing the one-third.

Until the Act of 1913 was passed, Mr. Higgins' management of his entire estate as a unit was certainly a perfectly legitimate business.

When the Act provided for the deduction of the expenses of "any business" that term was certainly broad enough to

include any existing legitimate business. The mere fact that it was in existence and had been for years, brought it directly within the provisions of the Act as a recognized business.

We maintain that the taxing officers had no right or authority to split up this single business of the taxpayer into two supposedly different businesses, and determine that one part of his life work was a "business" within the Act and the other not, simply because part was expenses of management of real estate and part was management of investments in securities.

They could no more make the division of his expenses between his management of his real estate and his management of his securities than they could divide the expenses of his management of his taxable securities from those of management of his tax-exempt ones.

Watson, et al., Trustees v. *Commissioner,* 35 B. T. A. 706;
Knox as Executor, 3 B. T. A. 143.

The entirety of such a business had been distinctly recognized by the Board of Tax Appeals in *Croker* v. *Commissioner,* 27 B. T. A. 588, 592, long ago acquiesced in by the Commissioner XII-1 C. B. 4.

And from 1913 till the present proceeding got before the Board of Tax Appeals (Cf. R. 21 and R. 84) the Commissioner had annually recognized the entirety of the business of this petitioner.

IV.

The true meaning of the word "business" in this Section is that declared by this Court in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171, shortly before the passage of the Revenue Law of 1913.

We are not unmindful of the definition of "carrying on trade or business" within the meaning of Section 23 (a) recently given in the concurring opinion of Justice FRANKFURTER (joined in by Justice REED) in *Deputy* v. *Du Pont*, 308 U. S. 488, 499, to-wit,

> " 'Carrying on any trade or business,' within the contemplation of §23 (a), involves holding one's self out to others as engaged in the selling of goods or services."

If that definition excludes the business of this taxpayer it would seem to conflict with the terms of the Act, which necessarily included any and every legitimate business that was in actual existence at the time when the Act was passed.

We question, too, the accuracy of this new definition, even irrespective of the fact that this taxpayer's business of managing his entire estate was an actual going business when the 1913 Act was passed, and had been for many years prior thereto.

Undoubtedly, a great deal of business is trade. The definition suggested by Justices FRANKFURTER and REED (which does not so far appear to have been adopted by the other members of this Court), seems to us to be in substance but little more than a definition of the particular

type of business which constitutes "trade", and to import the idea of "trade" into the meaning of "business," disregarding the wider meanings of the latter word, included in the Act by the use of the word "any".

The statute, since 1918, uses both terms, clearly indicating the opinion of Congress that there were activities included in the one term that were not included in the other.

The terms of Justice FRANKFURTER's definition of "business" would have to be stretched to the breaking point to include many kinds of business familiar to us all.

Thus, personal management of the taxpayer's own holdings of real estate which is not included in any ordinary meaning of this new definition, was expressly held by this Court to be business in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 169-171.

And such management of one's own real estate has long been recognized as carrying on business within the section now under consideration.

See:

Kales v. *Commissioner*, 101 F. (2d) 35, and instances there cited on pages 37-39.

In the case at bar the Commissioner admitted, and the Board of Tax Appeals found as a fact, that this petitioner's activities in managing his own real estate were "carrying on business" (R. 84).

The Circuit Court of Appeals, in its opinion in this present case, pointed out that that question was not before it (R. 244); and affirmed the Board's orders.

Later the same Court (one different Judge sitting) held that the active management of one's own extensive holdings of improved real estate did constitute "carrying on business" within the meaning of Section 303 (e) of the Revenue Act, expressly differentiating its later ruling from its own earlier ruling in the case at bar, on the ground that its decision in the case at bar did not pass on the management of the petitioner's real estate. That Court in that later case made no suggestion that the term "carrying on business" could be given a different meaning in Section 303(e) from that which it bore in Section 23(a) of the Act.

Pinchot v. *Commissioner,* 113 F. (2d) 718, 719.

It would certainly be difficult to bring such activities within the terms of "holding one's self out to others as engaged in the selling of *goods* or *services.*"

Was not Eli Whitney engaged in business all the years he was struggling to perfect the cotton-gin, even though he sold neither services nor goods, and had neither goods nor services to offer to sell?

Was not the clearing of the farms of New England and of the Ohio Valley by the original settlers for their own use, a huge piece of "business", of which this generation has inherited the benefits?

One who engages in prospecting, for oil for instance, has neither goods nor services to sell or offer to sell, until and unless he "strikes oil." Is he not engaged in "business" before that happy event?

How about the great Fire and Marine Insurance Corporations? They certainly are, in the common speech of

men, engaged in "business", but it would involve an inordinate stretch of the words to say that they are "holding themselves out to others as engaged in the selling of goods or services."

Other suggestions will readily occur.

All such activities would come directly within the definition of "business" adopted by this Court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, in construing the Corporation Tax Act, two years before Congress used that term in the Revenue Act of 1913, the predecessor of the 1932 Act.

This Court then said:

> "It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158 citing People ex rel. Hoyt v. Tax Comrs., 23 N. Y. 242, 244. 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit' 1 Bouvier's Law Dict. p. 272."
>
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171.

We respectfully submit that in passing the Revenue Act of 1913 Congress should be deemed to have used the term "any business" in the sense so declared by this Court without a dissent but two years before.

In the very recent *Pinchot* case the Circuit Court of Appeals for the Second Circuit cites that definition in *Flint* v. *Stone Tracy Co.* as the basis for its decision that Mr. Pinchot's testatrix had been engaged in "business".

Pinchot v. *Commissioner*, 113 F. (2d) 718, 719.

And in the still more recent case of *Pyne* v. *The United States* (35 Fed. Suppt. 81), the Court of Claims harked back to that definition in *Flint* v. *Stone Tracy Co.* as the correct one.

We may go a step further.

The Revenue Act of 1913 provided for the deduction of "the necessary expenses actually paid in carrying on any business" (Revenue Act of 1913, Sec. B II. See Appendix).

And that provision has never been dropped in any of the many re-enactments of the Revenue Act, despite the constantly repeated rulings of both the administrative officers, the Board of Tax Appeals and the Courts, giving the words "any business" a far wider meaning than that given in Justice FRANKFURTER's concurring opinion.

See cases cited *supra,* page 22.

The Commissioner from 1914 to 1932 recognized the entire activities of this particular taxpayer as a single entire business and allowed deduction of all its expenses.

Without multiplying other instances, in August, 1933, the Commissioner made the formal ruling:

> "You are advised that the Bureau has recently* adopted the policy of allowing as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection and handling of properties producing income."
>
> *Kales* v. *Commissioner,* 101 F. (2d) 35, 39.

---

* *Note*—as to the words "recently adopted" in this statement see *infra* page 58.

The Commissioner did not advance this theory of the divisibility of the expenses between management of real estate and management of securities until this present case got before the Board of Tax Appeals and his earlier theory of apportionment between taxable and tax-exempt securities was abandoned (R. 84).

The Board of Tax Appeals in at least two earlier cases had statedly adopted the definition of the word "business" in *Flint* v. *Stone Tracy Co.* as the proper one in construing the sections of the Income Tax Act using the word.

Eysenbach v. *Commissioner,* 10 B. T. A. 716;
Baker v. *Commissioner,* 17 B. T. A. 733, 737.

And in numerous decisions of the Courts that definition has been adopted in construing various provisions of the Revenue Act.

Crooks v. *Kansas City Ass'n.,* 37 F. (2d) 83;
Rogers v. *United States,* 41 F. (2d) 868;
Sears Roebuck & Co. Ass'n v. *Commissioner,* 45 F. (2d) 506, 508;
Sloan v. *Commissioner,* 63 F. (2d) 666, 669;
Chaloner v. *Helvering,* 69 F. (2d) 571;
Pinchot v. *Commissioner,* 113 F. (2d) 718;
Pyne v. *United States,* 35 Fed. Suppt. 81, 84.

This Section of the Revenue Act of 1913 was amended in some other respects by the Revenue Act of 1916, and in turn in 1918 (Sec. 214 (a) of the Revenue Act of 1918), to substantially its 1932 form, the words "trade or" being inserted in 1918 between the words "any" and "business." And since 1918 the section has been re-enacted without

substantial change in 1921, 1924, 1926, 1928, 1932, 1934, 1936 and 1938. (See Appendix.) But throughout every such change the provision for deduction of the expenses of "any business" had been retained up to and including 1932; and since 1932 has been retained throughout the later re-enactments of the Revenue Act.

Those re-enactments of the Act without substantial change are persuasive of legislative recognition and approval of the construction theretofore given to the term "any business."

Helvering v. *Winmill*, 305 U. S. 79, 83;
Helvering v. *Bliss*, 293 U. S. 144;
Kales v. *Commissioner*, 101 F. (2d) 35, 38-39.

That the management of the whole of this great estate by the taxpayer was a "business" within the definition in *Flint* v. *Stone Tracy Co.* can scarcely be gainsaid.

This taxpayer's activities met every feature of that definition.

Some added inference as to the intention of Congress in using the word "business" in the original 1913 Revenue Act may perhaps be gleaned from the context of the Act.

Section II B began with the following statement:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce or sales or dealings in property whether real or personal, growing out of

> the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities or the transaction of any lawful business carried on for gain or profit, or gains or profits, and income derived from any source whatever including the income from but not the value of property acquired by gift, bequest, devise or descent."

After a proviso concerning the proceeds of life insurance policies, that Section went on:

> "That in computing net income for the purpose of the normal tax, there shall be allowed as deductions: First, the necessary expenses actually paid in carrying on any business, not including personal, living or family expenses."

The words "any business" in the clause allowing deductions would seem to be correlative to the previous provisions, and certainly to include what is described in Section II B as the "transaction of any lawful business carried on for gain or profit"; and the exclusion of "personal, living or family expenses" would seem to mark clearly the intention of Congress in using the words "any business" in that original Act, and its intention to allow as deductions all other expenses incurred in "any lawful business."

What the Congress intended to exclude from such deductions was specified by it as "personal, living or family expenses." Any other expenses of "any lawful business" were to be allowed as a deduction and, as we point out below, *infra*, under Point VII, any legitimate business that was actually being carried on when the 1913 Act was adopted was recognized by that Act as one the expenses of which should be allowed as a deduction.

V.

Section 23(a) itself distinguishes between expense incurred in the course of isolated transactions, and lik expenses incurred in the usual course of the regula conduct of a business.

In its opinion in this case the Board of Tax Appeal said:

> "To allow the deductions claimed in the preser proceeding and to disallow them as was done i Kane v. Commissioner, *supra*, would be to make distinction between the small investor and one i vesting like the petitioner upon a very large scal for the nature of the expenses disallowed by th Commissioner obviously is the same in both case We cannot make distinction merely because of th extent of investments or of expenses commensura therewith" (R. 83).

It seems to us that this statement involves a certai confusion of thought on the part of the Board. It faile to observe that the Act itself specifically recognized difference between expenses of isolated semi-occasion transactions, and expenses of the same kind incurred "carrying on business."

The Board's comment is thus not one of constructi of the Act, but one of criticism of its express provision.

A man who holds a single $10,000 coupon bond, wh twice a year cuts his one coupon and deposits it in ba to his own credit, in each of those two brief acts is co ducting a business transaction; but he clearly is not "carr

ing on business'' in so doing. The elements of continuity, constant repetition, regularity and extent, long recognized in the decisions as involved in the statutory expression ''carrying on business,'' are completely lacking.

But where the securities involved run to many millions and the watching of maturities of coupons and other interest payments, and the promptness of payment, watching the attendant questions of the varying values of the securities, and the wisdom of retention or sale (R. 159-160), require, because of their number and constant occurrence, constant attention from a number of employees besides the taxpayer himself, it then does amount to ''carrying on business''; and when the expense of doing so as to the securities owned runs (according to the decision below) from $16,000 to $20,000 each year, occupying one-third of the entire time of four employees, besides practically daily attention from the taxpayer himself, it is quite obvious that the activities have the qualities, the continuity, the regularity, the variety and the extent which constitute ''carrying on business'' as opposed to mere isolated transactions.

The distinction provided by this clause of the statute does not depend upon the nature of the particular act performed, as the Board of Tax Appeals inferred, but on the continued recurrence of such acts and the constant and regular attention and labor required. It is this continuity of required attention and labor that characterizes the series of acts as ''carrying on business,'' when a few isolated transactions a year of identical character would not be such.

Kales v. *Commissioner*, 101 F. (2d) 35, 37;
Miller v. *Commissioner*, 102 F. (2d) 479.

The same idea was expressed in different form by the Circuit Court of Appeals for the First Circuit when it said:

> "Maintenance of an office for this purpose, though not conclusive, is significant."
>
> *Foss* v. *Commissioner*, 75 F. (2d) 326, 328.

VI.

The Act contains no suggestion that continuous and regular transactions in the management of a large amount of securities, which when performed by one to whom that business was farmed out would be business, the expenses of which the farmer would be entitled to deduct from his own income, shall cease to be business when conducted by the owner of the securities, for his own profit.

The handling of a vast amount of securities, watching whether the income is promptly paid, collecting and accounting for principal and income, even aside from attending to questions of reinvestment, is a recognized form of business, conducted frequently by Trust Companies and Banks, for which conduct of such business for others, they make well known charges.

When farmed out to a third person, his management of a stranger's property, even though confined to the management of securities, would clearly be "carrying on busi

ness,'' and this farmer's own necessary and ordinary expenses in carrying on that business would clearly be allowable as a deduction from his own private income from the job.

Is it any the less ''carrying on business'' simply because the owner of the securities actively attends to it himself for his own profit, instead of farming it out to a third person at greater expense.

Where in the Act can be found any provision or any justification for a ruling that such business shall cease to be considered ''any business'' if it is conducted by the owner of the securities in person, with the assistance of a staff of salaried employees?

The words, ''any business'' contradict any such differentiation. The new theory that if the owner of securities conducts that business himself, it ceases to be business, will not bear analysis in the face of the express words of the Act.

The Act does not authorize a differentiation between those carrying on a business for others, and those carrying on a business for themselves.

Whether transactions amount to ''carrying on business'' is not to be determined by who conducts it.

VII.

Where a single business is conducted by the taxpayer as an entirety involving large ordinary and necessary expenses for rental of offices and salaries of assistants necessary to the operation of that business, nothing in the Act authorizes either the Commissioner, or the Board of Tax Appeals, or the Courts, to sever those expenses and say that a percentage thereof shall be disallowed as a deduction because a corresponding percentage of the business, regularly conducted by the taxpayer for forty years, consists of the management of his securities and reinvestment thereof and the collection of the income therefrom.

The theory adopted below seems to involve reading into the statute a clause providing that one who owns both securities and large holdings of productive real estate, may not carry on the business of managing his own properties.

The statute on the contrary expressly allows him to take the deduction of the ordinary and necessary expenses incurred or paid during the taxable year in carrying on "any business."

There was nothing illegitimate in carrying on such a business as the taxpayer had been conducting since 1889 (R. 76), even the routine whereof had been unchanged since 1902 (R. 71), ten years before the Income Tax Amendment to the Constitution was adopted.

There is nothing in any of the series of Revenue Acts that says he may not continue to carry on that business,

begun years before their enactment. In fact Section II, B of the 1913 Revenue Act, from which the section under consideration takes its rise, imposed the tax on gains from "any lawful business carried on for gain or profit". That certainly was not a prohibition of any lawful business then and for many previous years carried on by this petitioner or by any one else.

Concededly expenses of a business cannot be apportioned and partly disallowed because part of the income of the business is derived from tax-exempt securities.

Watson, et al., Trustees v. *Commissioner*, 35 B. T. A. 706;
Knox as Executor, 3 B. T. A. 143.

That ruling was not only acquiesced in by the Commissioner as late as 1937, 1 C. B. 27, but expressly recognized by the Board in its opinion in the case at bar (R. 84).

Where a business is being regularly conducted by a taxpayer, all the ordinary and necessary expenses thereof are by the express terms of the Statute deductible.

In the present case the taxpayer was admittedly carrying on business. The business he was conducting was and for forty years had been, actually, the management of his entire estate. Can part of the expenses of that business be disallowed on the questioned theory adopted below, that if the management of his own securities had been conducted by him separately it would not have been a business, despite having every other characteristic of a regularly conducted business?

In *Croker* v. *Commissioner*, 27 B. T. A. 588, the Board of Tax Appeals held such a business an entirety, saying:

> "The petitioner had, together with her husband, appointed McDonald to act as her agent in the sale of valuable real estate in Florida and for the purpose of collecting interest upon bonds and notes. The sale and care of this property and of her investments in Florida constituted her business." (27 B. T. A. 588, 592.)

And this ruling was "acquiesced" in by the Commissioner in 1933. XII-1, C. B. 4.

The expenses disallowed, as to which we have appealed were part of the ordinary and necessary expenses of the legitimate business carried on by the taxpayer, paid during the taxable year; and being such were improperly disallowed as a deduction, contrary to the express provision of the Act, that in computing net income there should be allowed as a deduction "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

Though the decision below seeks to separate the taxpayer's business into different branches, he himself has never done so, and the Act provides for deduction of all the ordinary and necessary expenses of the business he is carrying on.

This attempted present severance of this taxpayer's business involves another difficulty. If the business is severable now, it was equally severable before the original Act was passed. And if that is the case, then the business

of managing his own securities carried on by him as a regular business before and when the 1913 Act was passed, was itself a business described in the original Act, when it said "any business."

Recognition of the management of one's own securities, if possessing the other qualities of constant activity, etc., as one of the kinds of business included in the terms of the original Act of 1913, is a necessary corollary of this theory of present severability.

VIII.

The ordinary and popular meaning of the term "any trade or business" is broad enough to include the management of one's own securities if that management involves the elements of constant attention and care instead of mere sporadic transactions.

When we consult the lexicographers, we find a great variety of meanings given to the word "business." In some of them, as a subordinate definition, we find the word "trade." In the Oxford Dictionary it is in the twenty-first definition of "business." As indicated by its lowly position among the many definitions of "business," trade is but a particular type of "business," the latter being a word of much broader import, especially when preceded by the word "any."

Correlatively, we find in the Century Dictionary a definition of "trade" as "the business of buying and selling";

implying directly that there are other kinds of "business" than buying and selling.

As this Court said, years ago,

> "'Business' is a very comprehensive term and embraces everything about which a person can be employed."
>
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 170, 171.

And the law lexicographers have long given it that meaning in slightly varying forms.

Today the word is commonly used in ordinary speech, as characterizing something distinguished from pleasure or social activities, as a man goes on a "business" trip, or on a social or pleasure trip. That marks the ordinary definition of the word, and concurs with the definition in *Flint* v. *Stone Tracy Co.*

In this particular section of the statute, there are two specific features indicating that the word is not used in the statute in that narrow sense of "trade."

First, the word "any" gives the term its broad meaning, and not its most limited one.

Second, the addition in 1938 of the words "*trade or*" between "any" and "business," shows conclusively that something else was intended by the word "business" than "trade."

In addition to these features is the fact that for twenty years after the enactment of the statute no such limited meaning of the words "carrying on business" was advanced either by the Revenue Department or the Court.

IX.

The history of the legislation and its administration strongly support the construction of the statutory provision concerning the deduction, for which we contend.

The phrase "engaged in business," as used in the Corporation Tax law of 1909, was construed by this court in 1911, in terms that clearly covered the activities of the taxpayer here.

This definition was given just about two years before the adoption of the Revenue Act of 1913, by which the allowance of a deduction of the expenses of his carrying on "any business" was allowed to the taxpayer. And the successive income tax Acts of Congress have constantly, in substance, retained the provisions for this deduction.

From 1913 on until 1934 the deduction of a taxpayer's expenses of actively managing his own fortune, whether invested in securities or lands, or in both was allowed by the Commissioner and by the Board of Tax Appeals in repeated cases.

(1920) O. D. 537, 2 C. B. 175;
(1921) O. D. 877, 4 C. B. 123;
(1929) *Kissel* v. *Commissioner*, 15 B. T. A. 1270, Acquiesced in VIII-2 C. B. 28;
(1929) *Ostenberg* v. *Commissioner*, 17 B. T. A. 738, 746;
(1933) *Croker* v. *Commissioner*, 27 B. T. A. 588, 592, Acquiesced in XII-1 C. B. 4;

(1932) *Bachofen-Von Echt* v. *Commissioner,* 27 B. T. A. 1419 (See 101 F. [2d] 39) reversing its prior decision in *Von Echt* v. *Commissioner,* 21 B. T. A. 702, decided in 1930;
(1934) I. T. 2751, XIII-1 C. B. 43.

The reversal of the *Bachofen-Von Echt* 1930 decision by the Board itself in 1932, led to a reexamination of the question by the Bureau, and in 1934, in a formal reply to the Committee of Banking Institutions on Taxation, the Revenue Bureau stated:

> "You are advised that the Bureau has recently adopted the policy of allowing as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection and handling of properties producing taxable income."
>
> 1934 C. C. H. Federal Tax Service Vol. 3, Sec. 6035, (p. 8027).

The words "recently adopted" refer to this reexamination and to its *readoption* of what had been the Bureau's steady policy since 1913, and not to any actual change of its long-standing policy, but only to a mooted one.

Other decisions allowing expenses of the business of management by the owner of his funds invested in securities are:

Alverson v. *Commissioner,* 35 B. T. A. 482, 488, Acquiesced in in 1937-1 C. B. 1;
Barney v. *Commissioner,* 36 B. T. A. 446, Acquiesced in in 1939-1 (Part I) C. B. 3;
Roebling v. *Commissioner,* 37 B. T. A. 82, 87-89;
Kenan v. *Bowers,* 48 F. (2d) 263, 266.

Moreover, from 1913 to 1932, this particular taxpayer had always claimed and been allowed, without controversy, to make the deduction from his gross taxable income of the entire expenses of the offices and staff maintained by him for the management of his estate, as expenses of a "business" carried on by him. (Unpublished. See Department Records.)

In *Croker* v. *Commissioner*, 27 B. T. A. 588, 592, the combination of the management of the owner's real estate and collection of interest on bonds and notes belonging to her, was specifically recognized as constituting her "business." And this decision was later "acquiesced" in by the Commission XII-1 C. B. 4.

The Board of Tax Appeals in at least three earlier decisions had expressly held that the definition given by this Court of "business" in *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, was the proper definition of the word where used in the Income Tax Act.

(1928) *Eysenbach* v. *Commissioner*, 10 B. T. A. 716, Acquiesced in, VII-2 C. B. 12;
(1929) *Elliott* v. *Commissioner*, 15 B. T. A. 494, Acquiesced in, VIII-2 C. B. 15;
(1929) *Baker* v. *Commissioner*, 17 B. T. A. 733, 737.

Similar decisions in the Courts prior to the 1932 reenactment of the Revenue Law were:

Wilson v. *Eisner*, 282 F. 38, 41;
Deering v. *Blair*, 23 F. (2d) 975, 976;
Washburn v. *Commissioner*, 51 F. (2d) 949, 952.

We fail to find any contrary decisions prior to that reenactment.

The Act was re-enacted in 1932, subsequent to all these decisions, without a suggestion from Congress that this construction of the word "business" had been erroneous.

The long-continued rulings of the Revenue Department, of the Board of Tax Appeals and the Courts, year after year for over fifteen years before the years here involved, during which the statute had been re-enacted without substantial change in this respect, in 1916, 1918, 1921 and 1932, makes applicable the doctrine:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received Congressional approval and have the effect of law."
>
> *Helvering* v. *Winmill,* 305 U. S. 79, 83.

And departmental rulings are adequate proof of the administrative practice.

> *Helvering* v. *Bliss,* 293 U. S. 144, 151;
> *McFeely* v. *Commissioner,* 296 U. S. 102, 108.

And this doctrine has been held applicable to this particular clause:

> "A recognized rule of statutory construction that the re-enactment of a statute by Congress in identical terms and failure to amend it in the face of consistent judicial and administrative construction is persuasive of a legislative recognition and approval of the statute as thus construed. Brewster v. Gage, 280 U. S. 327, Helvering v. Bliss, 293 U. S. 144, 151."
>
> *Kales* v. *Commissioner,* 101 F. (2d) 35.

This rule receives perhaps some added emphasis in the present case, because the same provision as to deductions of expenses paid in carrying on business has, since 1932, been re-enacted without material change in 1934, 1936 and 1938 (See Appendix), with repeated rulings meantime by the Courts applying the definition of "business" in the *Stone-Tracy* case to the section here involved.

Cecil v. *Commissioner,* 100 F. (2d) 896;
Kales v. *Commissioner,* 101 F. (2d) 35;
Wallace's Estate v. *Commissioner,* 101 F. (2d) 604,
Miller v. *Commissioner,* 102 F. (2d) 476, 479.

The decision of the Circuit Court of Appeals in the case at bar disregards this familiar rule.

We have not been able to find any opinion prior to the one at bar that repudiates the definition given to the word "business" in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 171, save the concurring opinion of Justices FRANKFURTER and REED in *Deputy* v. *Du Pont* (308 U. S. 488).

The constant re-enactment of this provision during more than a quarter of a century while this definition of the word "business" was maintained, is persuasive that the word "business" has been used by Congress in this Act in the sense declared by this Court in *Flint* v. *Stone-Tracy Co.* (220 U. S. 107, 171) to be the meaning of that word.

X.

The decision of the Circuit Court of Appeals should be reversed, and the deductions claimed of $20,270.89 for the year 1932 and of $16,087.44 for the year 1933 allowed.

Respectfully submitted,

SELDEN BACON,
ORWILL V. W. HAWKINS,
Attorneys for Petitioner.

SELDEN BACON,
Of Counsel.

APPENDIX

Evolution of Section 23, Subdivision (a) of the Revenue Act of 1932.

REVENUE ACT OF 1913, c. 16
38 Stat. 167

DEDUCTIONS

Section II B—"That in computing net income for the purpose of the normal tax there shall be allowed as deductions:

"First, the necessary expenses actually paid in carrying on any business, not including personal, living, or family expenses;"

REVENUE ACT OF 1916, c. 463
39 Stat. 759

DEDUCTIONS ALLOWED

"Sec. 5. That in computing net income in the case of a citizen or resident of the United States—

"(a) For the purpose of the tax there shall be allowed as deductions—

"First. The necessary expenses actually paid in carrying on any business or trade, not including personal, living, or family expenses."

REVENUE ACT OF 1918, LAWS 1919, C. 18
40 Stat. 1066

DEDUCTIONS ALLOWED

"Sec. 214. (a) That in computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;"

REVENUE ACT OF 1921, C. 136
42 Stat. 239

DEDUCTIONS ALLOWED INDIVIDUALS

"Sec. 214. (a) That in computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in

the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;"

REVENUE ACT OF 1924, c. 234
43 Stat. 269

Sec. 214(a) identical with Section 214(a) of 1921 Act.

REVENUE ACT OF 1926, c. 27
44 Stat. 26

Sec. 214(a) identical with Section 214(a) of 1921 Act.

REVENUE ACT OF 1928 c. 852
45 Stat. 799

"§23. DEDUCTIONS FROM GROSS INCOME

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from

home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

REVENUE ACT OF 1932, c. 209
47 Stat. 179

Sec. 23(a) identical with Section 23(a) of 1928 Act. (See pp. 11-12, *supra*).

Later Re-enactments.

REVENUE ACT OF 1934, c. 277.
48 Stat. 688

Sec. 23(a) identical with Section 23(a) of 1928 Act.

REVENUE ACT OF 1936, c. 690.
49 Stat. 1658

Sec. 23(a) identical with Sec. 23(a) of 1928 Act.

REVENUE ACT OF 1938, c. 289.
52 Stat. 460

"Sec. 23. DEDUCTIONS FROM GROSS INCOME

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES. (1) IN GENERAL—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

REVENUE ACT OF 1940

The Revenue Act of 1940 amended only certain Sections of the Revenue Act of 1938. It made no reference to the Section here involved, leaving it untouched as it stood in the 1938 Act.

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 10 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940.

No. 253

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

The much-delayed brief for the respondent does not seem to meet the arguments advanced by the petitioner, but proceeds to set up contentions that are rather foreign to the situation here presented.

Whether petitioner was carrying on a trade or business in looking after his security investments is by no means the only question presented here. There is primarily the question whether the entire business he had been conducting as an entity since 1889, and with-

out change in its system since 1902, could be split up by the Commissioner, after twenty years recognition of it as one single business, and when the Board found that he was carrying on business as to the concurrent management of his real estate.

Counsel for the respondent correctly state that none of the Treasury Regulations concerning the income tax contains a definition of the phrase "carrying on any trade or business." Those regulations do, however, consistently characterize the various expenses for which credit has been claimed here as normal expenses of a business, which they say may be deducted.

Thus, Article 121 of Regulation 74, of 1932 (which was substantially identical with the earlier Articles of 1924 and 1926) provides that:

> "Among the items included in business expenses are management expenses, commissions, labor, supplies * * * and rental for the use of business property."

The expenses for which deductions were claimed in this case were thus eminently characteristic of "carrying on business."

The suggestion at page 15 that a busy lawyer or surgeon may often find it necessary to take time out for supervising his investments or engage the services of someone to do it for him, begs the question. In the normal case of a busy lawyer or surgeon his investments are entirely collateral, his attention to them merely occasional, and are not his trade or business. Here the management of this vast estate was the daily activity of the petitioner.

The suggestion on page 25 of the respondent's brief that although "there have been some informal rulings which support petitioner's position, there have been in fact no regulations or Treasury Decisions in point, and that the actual practice of the Bureau of Internal Revenue has not been uniform on this issue" and the inference that its practice would be of little aid to the Court in construing the statute, seems to get away from the facts. As far as we have been able to ascertain from all publications on the subject, the actual practice of the Bureau has been uniform up till the time that the present case got into the Board of Tax Appeals. The respondent forgets, too, the numerous decisions of the Board of Tax Appeals and of the Courts cited on pages 57 to 59 of our brief, and the frequent express official acquiescences in those decisions of the Board of Tax Appeals cited on those pages. Those acquiescences are cited from the Treasury Department's own publications, as Acquiescences of the Commissioner.

Counsel for the respondent have failed to point out any instance of any contrary ruling until the present case.

Up to the time that this particular case got before the Board of Tax Appeals, the contentions of the Commissioner appear to have been uniformly that the activities of the taxpayer shown in particular cases did not have that regularity and continuity that would entitle them to be considered as "carrying on business"; while recognizing over and over again that such activities in the management of securities *might* have the elements of continuity and regularity so developed as to constitute "carrying on business."

We do not quite understand the claim that the rulings relied on by us were not promulgated by or with the approval of the Secretary of the Treasury. They were promulgated in the Internal Revenue Bulletins put out by the Treasury Department. In quoting the statement on the front page of the Bulletin that the rulings "do not have the force and effect of Treasury Decisions" counsel omits inadvertently the rest of that quoted sentence, namely: "They are applicable only to the facts presented in the published case."

The suggestion that this Court in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467-468, in *Biddle* v. *Commissioner*, 302 U. S. 573, 582, and in *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 52, has recognized that such rulings are of little weight in interpreting the statute, does not seem to be borne out by the decisions so cited.

In the first of those cases, this Court pointed out that there had been no Court rulings and no rulings by the Board of Tax Appeals.

In the second case the Court pointed out that there had been no published rulings.

And in the last case, this Court pointed out that "The practise has not been revealed by any published ruling or act of the Department on which taxpayers could have relied." (308 U. S. 52)

These decisions clearly do not overrule *Helvering* v. *Bliss*, 293 U. S. 144, 157, or *McFeely* v. *Commissioner*, 296 U. S. 102, 108.

The contention that we cite only two rulings promulgated prior to the taxable years involved, namely O. D.

537, 2 C. B. 175 (1920) and O. D. 877, 4 C. B. 123 (1921) seems to overlook entirely the following decisions cited on pages 57-58 of our main brief:

(1929) *Kissel* v. *Commissioner,* 15 B. T. A. 1270 Acquiesced in VIII-2 C. B. 28;

(1929) *Ostenberg* v. *Commissioner,* 17 B. T. A. 738, 746;

(1933) *Croker* v. *Commissioner,* 27 B. T. A. 588, 592, Acquiesced in XII-1 C. B. 4

(Decided in January, 1933 before the petitioner's return for his 1932 income tax return could be made out, and acquiesced in in May, 1933.)

Bachofen-Von Echt v. *Commissioner,* 27 B. T. A. 1419;

Kenan v. *Bowers,* 48 F. (2d) 263, 266.

The *Wurts-Dundas* and *Van Wart* cases, to which counsel for respondent refers, have proceeded on entirely different bases, and have no application to the question here presented.

The suggestion on page 29 of the brief for respondent that "The ruling most heavily relied upon by petitioner is I. T. 2751, XIII-1 C. B. 43 (1934)" is merely his assumption. That was only one of a multiplicity of decisions cited on pages 57 to 59 of our brief; and by no means the most important one.

The suggestion on page 29 of respondent's brief that the very number of cases in which the question of trade or business was litigated confirms the fact that the actual practice of the Treasury was not uniform either before or

after 1934 *"with respect to this issue"*, quite confuses th question.

There had been no lack of uniformity in the practice o the Treasury up to 1934 with respect to the issue here pre sented. Its contentions seem uniformly to have been, fro 1913 on, in all such cases, that the particular activities pre sented in the given case were not sufficiently regular an continuous to constitute the carrying on of business, bu showed only occasional isolated transactions.

Until the present case reached the Board of Tax Ap peals, we fail to find any instance in which it had bee contended by the Commissioner that the management o one's own securities *could* not be "carrying on business' His uniform contention till then was that, in the particu lar given case before the Court, the activities shown di not present either the regularity or continuity essential t distinguish mere isolated transactions from the regula carrying on of business.

Now the respondent comes out with the square pro position (p. 17): "It is our position that mere persona investment activities never constitute carrying on a trad or business, no matter how much of one's time or of one' employee's time they may occupy." That is a propositio of law which we dispute.

On page 18 of respondent's brief, reference is made t the case of *Union Trust Co.* v. *Commissioner*, 54 F. (2 199. We fail to find in that decision of the Sixth Circu Court of Appeals any such ruling as is suggested in th respondent's brief.

In our main brief we cited the case of *Trustees* o *White* v. *Commissioner*, decided by the Third Circu

Court of Appeals in October last. We left the volume and page of the Federal Reporter blank, expecting to be able to fill it in. That opinion has not yet appeared in the Federal Reporter and we are informed by the publisher that it is being withheld from publication at the request of that court as an application for rehearing is pending. The opinion appears, however, in C. C. H. '40, Vol. 4, p. 10793.

Respectfully submitted,

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 21 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940.

No. 253.

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply Memorandum for the Petitioner to the Supplemental Memorandum on Behalf of the Respondent.

We received on January 15, 1941, in this case, a supplemental memorandum from the Solicitor General in regard to the Internal Revenue Bureau's reconciliation of the provisions of Section 23-A with those of Section 101-(C)(8) of the Revenue Act of 1932 (since then amended), and we see no reason to dissent from his conclusions in regard to that matter.

We noted, however, that the memorandum so served failed to contain any statement of the practice of the Comsioner, up until the hearing of the present case before the

Board of Tax Appeals, as to treating the management by a tax payer of his own securities as "carrying on business" where the activities of the taxpayer had the regularity, variety, extent and continuity of "carrying on business", as distinguished from mere isolated transactions.

We, therefore, wrote the Solicitor General on the 16th of January, 1941, admitting service of the said supplemental memorandum, and inquiring whether he contemplated filing any further supplemental memorandum, and on January 18th, 1941 received from him a note to the effect that he did not contemplate filing any further memorandum.

The contentions of the petitioner under Points II and IX of our main brief, as to the steady practice of the Internal Revenue Bureau on this point up to the hearing of this case before the Board of Tax Appeals, thus remain without tangible challenge, or citation of any case of different contention on the part of the Commissioner of Internal Revenue, despite the oral suggestion of counsel for the respondent on the argument that the practice had varied, and despite the request of Justice STONE for citation of any divergent rulings on the part of the Commissioner.

Evidently no divergent rulings that could possibly have come to the attention of the Congress could be found by counsel for the respondent, any more than by ourselves.

Respectfully submitted,

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

Blank Page

Blank Page

FILE COPY

FILED
APR 13 1940

No. 868

In the Supreme Court of the United States

October Term, 1940

Thomas Hinton, Petitioner

vs.

Guy T. Helvering, Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Blank Page

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the granting of a writ of certiorari in this case.

In the petition for certiorari it is asserted that the decision of the court below that the taxpayer was not engaged in carrying on a trade or business in respect to his investments in stocks and bonds is in conflict with *Kales* v. *Commissioner*, 101 F. (2d) 35 (C. C. A. 6th), and with the decision of the Circuit Court of Appeals for the Third Circuit in

251673—40

du Pont v. *Deputy*, 103 F. (2d) 257, reversed on another ground by this Court, 308 U. S. 488.*

The court below held that Section 23 (a) of the Revenue Act of 1932, in allowing deduction of ordinary and necessary expenses in "carrying on any trade or business," uses the quoted words in their popular meaning, and that their popular meaning does not embrace the conserving or enhancing of one's estate. While we think that this view of the court below is correct, it is contrary to the holding of the circuit court of appeals in the *du Pont* case and probably cannot be reconciled with the decision in the *Kales* case.

In view of this conflict of decisions the granting of a writ of certiorari in the present case is not opposed.

Respectfully submitted,

NEWMAN A. TOWNSEND,
Acting Solicitor General.

AUGUST 1940.

* The question whether a taxpayer's activities in conserving and enhancing his estate constitute the carrying on of a trade or business within the meaning of the Revenue Act was reserved by this Court in the *du Pont* case, the Court stating that it was unnecessary for it to pass upon the question because in its opinion the deduction sought was on other grounds not properly allowable in that case.

U. S. GOVERNMENT PRINTING OFFICE: 1940

Blank Page

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 8 1941
CHARLES ELMORE CROPLEY
CLERK

No. 253

In the Supreme Court of the United States

OCTOBER TERM, 1940

EUGENE HIGGINS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Blank Page

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Summary of argument	8
Argument:	
The petitioner's activities in connection with his security investments did not constitute the carrying on of a trade or business, and the expenses incurred in connection with those investments are not deductible under Section 23 (a) of the Revenue Act of 1932	11
Conclusion	30
Appendix	31

CITATIONS

Cases:	
Alverson v. *Commissioner*, 35 B. T. A. 482	13
Bedell v. *Commissioner*, 30 F. (2d) 622	13, 15, 18
Biddle v. *Commissioner*, 302 U. S. 573	26
Burnet v. *Clark*, 287 U. S. 410	13
Burnet v. *Commonwealth Imp. Co.*, 287 U. S. 415	13
Chaloner v. *Helvering*, 69 F. (2d) 571	17
Dart v. *Commissioner*, 74 F. (2d) 845	13
Deputy v. *du Pont*, 308 U. S. 488	17, 18, 22
Flint v. *Stone Tracy Co.*, 220 U. S. 107	21, 23
Foss v. *Commissioner*, 75 F. (2d) 326	13
Helvering v. *Ind. Life Ins. Co.*, 292 U. S. 371	17
Helvering v. *N. Y. Trust Co.*, 292 U. S. 455	26
Helvering v. *Winmill*, 305 U. S. 79	13
Higgins v. *Smith*, 308 U. S. 473	29
Hutchings v. *Burnet*, 58 F. (2d) 514	16
Kales v. *Commissioner*, 101 F. (2d) 35	16, 26
Kane v. *Commissioner*, 100 F. (2d) 382	15
Lindley v. *Commissioner*, 63 F. (2d) 807	16
McCoach v. *Minehill Railway Co.*, 228 U. S. 295	23
Miller v. *Commissioner*, 102 F. (2d) 476	15
Monell v. *Helvering*, 70 F. (2d) 631	15
New Colonial Co. v. *Helvering*, 292 U. S. 435	17
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601	22
Rogers v. *United States*, 41 F. (2d) 865	15

Cases—Continued. Page

Sacks v. *Commissioner*, 66 F. (2d) 308 13
Estate of Sanford v. *Commissioner*, 308 U. S. 39 26
Union Trust Co. v. *Commissioner*, 54 F. (2d) 199 18
United States v. *Emery*, 237 U. S. 28 23
Van Wart v. *Commissioner*, 295 U. S. 112 ..... 16, 27, 28
Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503 23
Washburn v. *Commissioner*, 51 F. (2d) 949 13
Wegeforth v. *Commissioner*, 42 B. T. A. 633 15
Welch v. *Helvering*, 290 U. S. 111 17
White v. *Commissioner* (C. C. A. 3d), decided October 9, 1940 15
White v. *United States*, 305 U. S. 281 17
Woolford Realty Co. v. *Rose*, 286 U. S. 319 17
Wurts-Dundas v. *Commissioner*, 17 B. T. A. 881, affirmed, 54 F. (2d) 515 28
Zonne v. *Minneapolis Syndicate*, 220 U. S. 187 23

Statute:
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 22 17
Sec. 23 ..... 8, 11, 12, 17, 22, 23, 31
Sec. 24 ..... 9, 16, 32

Miscellaneous:
I. T. 2124, IV–1 Cum. Bull. 138 ..... 27, 28, 29
I. T. 2751, XIII–1 Cum. Bull. 43 29
Mim. 4580, 1937–1 Cum. Bull. 62 29
O. D. 537, 2 Cum. Bull. 175 (1920) 26, 27
O. D. 877, 4 Cum. Bull. 123 (1921) 26, 27
Treasury Regulations 33 (1918 ed.), pp. 18–19 26
Treasury Regulations 41, Art. 8 26
Treasury Regulations 45, Art. 101 26
Treasury Regulations 62, Art. 101 26
Treasury Regulations 65, Art. 101 26
Treasury Regulations 69, Art. 101 26
Treasury Regulations 75, Art. 121 26
Treasury Regulations 77:
Art. 121 ..... 26, 32
Art. 125 33
Art. 281 33
Treasury Regulations 86, Art. 23 (a)–1 26
Treasury Regulations 94, Art. 23 (a)–1 26
Treasury Regulations 101, Art. 23 (a)–1 26
Treasury Regulations 103, Art. 19.23 (a)–1 26

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 68) is reported in 39 B. T. A. 1005. The opinion of the Circuit Court of Appeals (R. 243) is reported in 111 F. (2d) 795.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 22, 1940 (R. 245). The petition for a writ of certiorari was filed July 18, 1940, and granted October 14, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is entitled to deduct certain expenditures made by him in 1932 and 1933 in connection with security investments as ordinary and necessary expenses paid in carrying on a trade or business within the meaning of Section 23 (a) of the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations involved will be found in the Appendix, *infra,* pp. 31–33.

STATEMENT

The Board of Tax Appeals adopted the stipulation of facts entered into by the parties (R. 69, 48–67), and made certain additional findings of fact (R. 69–78) based upon the evidence introduced at the trial (R. 109–238).

The petitioner is a citizen of the United States, though he has not been in this country since 1921. He has lived in Europe, particularly in France, during that period as a matter of choice for his own pleasure and for his health. He has a sea-going yacht. He has no busines in Europe and has not reported any income from foreign corporations (R. 68–69, 74–75).

During the taxable years, 1932 and 1933, the petitioner's personal fortune was approximately $35,000,000 or $36,000,000. He owned some 30

pieces of real estate in or near New York, valued at approximately $10,000,000. The remainder of his wealth was invested in securities, more than half of which consisted of tax-exempt bonds, $16,453,000 in 1932 and $17,278,000 in 1933 (R. 70, 72). The question here presented is whether he may deduct as "business" expenses various expenditures made by him during the years 1932–1933 in connection with his securities. The Commissioner conceded that the expenses in connection with petitioner's real estate activities were deductible as "business" expenses, but contested the deductibility of the expenditures relating to petitioner's security investments. However, since the facts pertaining to the real estate and the securities are interrelated, it will be helpful to set them forth in full, even though the real estate expenses are not here involved.

In his 1932 income-tax return, the petitioner stated that his business, occupation, or profession was that of renting real estate. In his 1933 return, he listed no business or occupation. No income for either year was reported under the heading of "Income from business or profession." With the exception of one relatively small item in each year ($356.42 for 1932 and $1,250 for 1933), all income was reported under four heads: interest on bank deposits, notes, etc.; interest on tax-free covenant bonds; rents and royalties; and dividends from domestic corporations.

Petitioner's income in 1932 was over $1,000,000, of which $643,037.68 was derived from government tax-exempt bonds, and his income in 1933 was over $900,000, of which $654,791.14 similarly consisted of tax-exempt interest on government bonds (R. 55). Income from rents and royalties was $209,597.26 in 1932 and $173,622.81 in 1933 (R. 77).

In connection with his affairs, petitioner maintained an office in New York which was managed by William S. Whitehead with the aid of three assistants, namely Martin J. Dietz, Gustav Zimmerman, an accountant, and one Bessenbeck, a stenographer and clerk (R. 69–70). He also maintained an office in Paris upon the same grounds as his residence where he employed one D. P. Cousteau, who would attend to petitioner's correspondence and "check off" the accounts sent by the New York office (R. 70, 76).

In his New York office, the petitioner maintained an organization known as a board of control, which board during the taxable years here involved consisted of Whitehead, Zimmerman, and Marshall Stearns, who was an attorney and the petitioner's personal counsel (R. 70). The board of control devoted itself exclusively to the management of petitioner's real estate; it had nothing to do with his securities (R. 71). It met twice a week, and kept minutes of its meetings, which were sent to petitioner. At such meetings it considered propositions for new tenants and its discussions were limited to real estate matters. The board investi-

gated prospective tenants, arranged for leases, etc. In each case, however, petitioner's approval was required, and he kept in touch with his New York office almost daily. For the past 10 or 15 years, the petitioner has had a policy of not selling any real estate, the last sale occurring in 1927 (71–72).

The principal activity of the New York office was the management of petitioner's real estate (R. 75). However, a certain amount of its activities related to petitioner's securities. It kept records of his securities, and deposited his interest and dividend checks with the National City Bank or the United States Trust Company where he had accounts upon which he alone had authority to draw. He maintained a third account at the Chase National Bank to meet office salaries and expenses, upon which Stearns and Whitehead had authority to draw (R. 73–74). The office prepared and sent to petitioner a weekly statement of receipts and disbursements. It also submitted to him an annual report which took about two weeks to prepare and one week to typewrite (R. 72). Both the annual and weekly reports dealt with real estate as well as securities (R. 72, 75).

Petitioner kept his securities in two boxes, to one of which he alone had access, and to the other of which Whitehead and Stearns had access (R. 72).

Petitioner did not use his office to purchase any securities. His securities were purchased for him by the United States Trust Company (R. 72). In

his directions to that company he often stressed the requirement that investments must be entirely safe, and more than half of his securities in 1932 and 1933 were tax exempt. In 1932 the only securities purchased consisted of Massachusetts and New York state bonds and Boston municipal bonds in the aggregate amount of $675,000 (R. 72–73). In 1933 the only securities purchased were United States Government bonds in the aggregate amount of $1,052,000.[1] No one in petitioner's office made any recommendations or had anything to do with the purchase of such securities except to receive them from the United States Trust Co., to check them off with the United States Trust Co. list, and to place them in the safe deposit vault. And the activities of the office thereafter with respect to the securities were limited to receiving and depositing interest, etc., and making the usual periodic reports (R. 72, 73).

Duplicates of the records kept in the New York office were, during the taxable years, kept in France. These consisted of a cash book, registry of dividends and interest, and account books as to real estate. On two different occasions a duplicate set of the books of the New York office was sent to the petitioner in Paris. In the taxable years the extent of the petitioner's activities in the corporate

[1] Apparently the 1932 purchases were made in not more than 22 transactions and the 1933 purchases in not more than 15 (R. 146).

enterprises in which his money was invested was to receive reports and keep track of the dividends and interest he received as an investor in the stock. The stock in the various corporations owned by the petitioner was in his name, and he did not appoint anyone to vote for him (R. 76–77).

During the years 1932 and 1933 the taxpayer expended $76,498.37 and $74,502.26 respectively in connection with the maintenance of his offices, and sought deductions on account of those amounts as "business" expenses (R. 49, 52, 69). Those amounts are itemized in the record at pp. 50–54. In the Board of Tax Appeals, the Commissioner conceded that the real estate activities of the taxpayer constituted a trade or business, so that such portions of the foregoing amounts as were attributable to the real estate activities were conceded to be deductible (R. 79). However, the Commissioner contended and the Board determined that to the extent that the expenditures related to the securities they did not constitute "business" expenses within the meaning of the statute. Accordingly, where any of the items related entirely to the real estate the Board allowed deductions in full; where any of the items related entirely to the securities or were otherwise personal in nature deductions were denied in full; and finally where the items related inextricably to both real estate and securities, the Board determined that two-thirds thereof were allocable to real estate and thus deductible, leaving

one-third to be ascribed to the securities for whic deductions were denied [2] (R. 85–86).

The Circuit Court of Appeals affirmed, holdin that in caring for his investments in securities pet tioner was not "carrying on any trade or business within the meaning of Section 23 (a) of the Reve nue Act of 1932.

SUMMARY OF ARGUMENT

The petitioner seeks to deduct expenses of hi offices maintained in New York and Paris as ordi nary and necessary business expenses incurred i "carrying on" a "trade or business" within th meaning of Section 23 (a) of the Revenue Ac of 1932. The Commissioner did not contest th petitioner's right to a deduction for that portion o the expenses for 1932 and 1933 as was allocable t the petitioner's real estate activities, but contende that the portion of the expenses attributable to th security investments should be disallowed upon th ground that that portion was not incurred in carry ing on a trade or business. The only question her is whether the petitioner was engaged in carryin on a trade or business in looking after his securit investments.

The petitioner does not contend that he was a trader or speculator, and the record clearly show that he was not. He made no sales of securitie

[2] A more complete description of the various items and th facts upon which the various allocations were made appea in the record at pp. 50–54, 75–76, 77–78.

in either taxable year and derived his income from interest, rents, and dividends. The only securities purchased in either year consisted of state, municipal, and United States bonds. Since he was not a trader, the cases holding that a trader is engaged in a trade or business are not in point. The petitioner concedes that he was not engaged in any managerial activities in connection with any of the corporate enterprises in which he had investments, and hence that cases holding that such investors are engaged in a trade or business, whether correctly or incorrectly decided, are also not pertinent.

The petitioner's contention that he was engaged in a trade or business necessarily rests solely upon the fact that he was a man of great wealth and that the volume of his securities meant that collecting, recording, and investing the income from them occupied his own attention and that of his employees or agents. But these facts do not distinguish the case from that of any other investor incurring expenses in handling his investments, and the expenses incurred are personal expenses which the petitioner is prohibited from deducting by Section 24 (a).

The petitioner's argument that the management of his real estate and securities constituted a single business, and that there was no justification for apportioning the expenses between the several activities, is unsound. Only business expenses are allowable as deductions, and a personal expense is not

converted into a business expense by a taxpayer's failure to earmark the disbursements. He may not blend personal with business expenses for the purpose of obtaining a deduction which the statute otherwise denies to him.

The contention is made by the petitioner that trust companies frequently handle securities for the owner and that in so doing the trust company is engaged in business. From this premise the petitioner argues that if the owner handles his own securities, he must likewise be engaged in business. The petitioner's conclusion does not follow from his premise. When a trust company handles securities for the owner, its business consists of selling its services. When an owner handles his own securities, there is no selling of services. Performance by a taxpayer of services for himself does not constitute a business.

There has been no long-continued, consistent administrative practice supporting the petitioner's position which has received the implied approval of Congress. None of the regulations issued since 1918 in relation to the income tax contains a definition of the phrase "carrying on any trade or business," and the two informal rulings issued prior to the taxable years referred to by the petitioner have been discredited by later court decisions. The lower tribunals have not been consistent in stating the rule to be followed or in applying the rule, and the amount of litigation of itself indicates absence of settled administrative practice.

ARGUMENT

THE PETITIONER'S ACTIVITIES IN CONNECTION WITH HIS SECURITY INVESTMENTS DID NOT CONSTITUTE THE CARRYING ON OF A TRADE OR BUSINESS, AND THE EXPENSES INCURRED IN CONNECTION WITH THOSE INVESTMENTS ARE NOT DEDUCTIBLE UNDER SECTION 23 (A) OF THE REVENUE ACT OF 1932

1. *Introductory.* During the taxable years 1932 and 1933 the petitioner owned real estate in New York City valued at approximately $10,000,000, and in addition owned securities of a value between $25,000,000 and $26,000,000, of which in excess of $16,000,000 in 1932 and $17,000,000 in 1933 were nontaxable. In those years, and for many years prior thereto, the petitioner maintained an office in New York, where he employed four persons, and an office in Paris, where he employed one person. The entire time of these persons was devoted to the petitioner's affairs. He seeks to deduct the expenses of these offices as ordinary and necessary expenses incurred in carrying on a trade or business within the meaning of Section 23 (a) of the Revenue Act of 1932, *infra*, p. 31.

No question has been raised by the Commissioner as to the propriety of the deduction of that portion of the expenses properly allocable to the petitioner's real estate investments, but the Commissioner contends that the portion of the expenses attributable to security investments should not be allowed as a deduction upon the ground that the activities in connection with those investments did not constitute the carrying on of a trade or busi-

ness within the meaning of Section 23 (a). The decision of the Board sustaining the Commissioner was affirmed by the court below, and the sole question before this Court is whether the conclusion below upon this point is correct.

The petitioner makes no contention that he was engaged in business as a trader or speculator, and it is obvious that no such contention can be made. All of the income reported in his returns for 1932 and 1933 consisted of interest on bonds and bank deposits, rents and royalties, and dividends on stock, except that for the first year he reported a small amount received in settlement of an agreement to cancel a lease, and, in the second year, a small item representing a judgment collected (R. 56, 60). His returns show no gains or losses from the sales of securities (R. 56, 60), and the record does not indicate that he maintained any brokerage accounts. The Board found that his securities were purchased for him by the United States Trust Company of New York, and that the only securities purchased in 1932 and 1933 consisted of City of Boston bonds, State of Massachusetts bonds, State of New York bonds, and United States bonds.[2]

At the very outset it is necessary to distinguish two lines of cases which, although raising superfi-

[2] The record does indicate that there was one change in his investments in 1932 for the reason that the Lackawanna Securities Company was liquidated in that year and the petitioner received bonds of the Glen Alden Coal Company in exchange for his stock (R. 19–20).

cially similar issues, are nevertheless entirely different and should be put aside in order to forestall any confusion.

First, in view of the fact that the petitioner was not a trader or speculator in securities, cases holding or assuming that a trader or speculator is engaged in business are not in point. See *Bedell* v. *Commissioner*, 30 F. (2d) 622, 624 (C. C. A. 2d); *Dart* v. *Commissioner*, 74 F. (2d) 845 (C. C. A. 4th); *Sacks* v. *Commissioner*, 66 F. (2d) 308 (C. C. A. 4th). See also *Helvering* v. *Winmill*, 305 U. S. 79; *Alverson* v. *Commissioner*, 35 B. T. A. 482.

Second, since petitioner concedes that he was not engaged in any managerial or other activities in connection with any of the corporate enterprises in which he had investments (Br. 10), cases holding that such investors are engaged in a trade or business are likewise not relevant. Cf. *Foss* v. *Commissioner*, 75 F. (2d) 326 (C. C. A. 1st); *Washburn* v. *Commissioner*, 51 F. (2d) 949 (C. C. A. 8th). While we question whether those decisions are correct insofar as they hold that an individual's participation in the management of the business of a corporation in which he owns stock has a bearing on the question whether such a person is engaged in a trade or business in connection with his security investments (see *Burnet* v. *Clark*, 287 U. S. 410; *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415), it is not necessary to consider those cases here.

2. The petitioner's contention that he was engaged in a trade or business rests soley upon the fact that he was a man of great wealth, and that the volume of his securities meant that collecting, recording, and investing the income from them occupied his own attention and that of those whose services he engaged to help him.

In each of the years 1932 and 1933, the petitioner had a gross income of approximately one million dollars, over six hundred thousand dollars of which in each year was derived from tax-exempt bonds. In those years the petitioner made no sales of either securities or of real estate, and his only purchases were of nontaxable securities in a relatively small number of blocks, apparently out of accumulated income. No one in the New York office had anything to do with the purchase of securities except to receive them from the United States Trust Company and to place them in a safe-deposit vault. And the duty of the office thereafter was limited simply to receiving and depositing income therefrom, and to keeping records and making periodic reports to petitioner. Duplicate sets of books were kept in the New York office and the Paris office. Each week the petitioner was furnished a statement of receipts and disbursements; and an annual report, requiring rather extensive preparation, was likewise submitted to the petitioner by his New York office. But it is plain that such reports were only for the personal convenience of petitioner,

and their preparation no more constituted "business" activity that the keeping of less extensive records by persons of moderate means which undoubtedly does not constitute the carrying on of a trade or business.

We submit that the mere volume of his holdings does not distinguish the petitioner from any other investor, or entitle him to claim deductions for expenses that would not be allowed to a small investor.

Nearly everyone who has inherited or accumulated any capital devotes some time and energy to the conservation and enhancement of that capital, to a consideration of the character of his investment, and to the maintenance of records with respect thereto. The busy lawyer or surgeon may often find it necessary to take time out for this purpose or to engage the services of someone to do it for him. In the normal case such investment activity is not regarded as the conduct of a trade or business, and expenses incurred in connection with such activity are not deductible as business expenses. *Kane* v. *Commissioner,* 100 F. (2d) 382 (C. C. A. 2d); *Monell* v. *Helvering,* 70 F. (2d) 631 (C. C. A. 2d); *Bedell* v. *Commissioner,* 30 F. (2d) 622 (C. C. A. 2d); *Wegeforth* v. *Commissioner,* 42 B. T. A. 633. Cf. *Rogers* v. *United States,* 41 F. (2d) 865 (C. Cls.); *Miller* v. *Commissioner,* 102 F. (2d) 476 (C. C. A. 9th); *White* v. *Commissioner* (C. C. A. 3d), decided October 9, 1940, not yet offi-

cially reported, but may be found in 1940 Prentice Hall, Vol. 4, Par. 62904; *Van Wart* v. *Commissioner*, 295 U. S. 112; *Hutchings* v. *Burnet*, 58 F. (2d) 514 (App. D. C.); *Lindley* v. *Commissioner*, 63 F. (2d) 807 (C. C. A. 2d); but cf. *Kales* v. *Commissioner*, 101 F. (2d) 35 (C. C. A. 6th). Such investment expenses are personal expenditures, the deduction of which is specifically prohibited by the Revenue Act. See Section 24 (a), *infra*, p. 32.

The activities of the taxpayer here involved are precisely of the same character as those of the lawyer or surgeon in the case supposed. The difference is solely one of degree. A man of great wealth will naturally spend more time in looking after his affairs, or incur greater expense in having them looked after, than will the man of smaller means. But in proportion to the income derived, the burden in both cases is probably the same, and it seems impossible to believe that Congress intended to discriminate against persons of moderate means in favor of the owners of great wealth. Indeed, the basic philosophy underlying the graduated income tax forbids any such discrimination, and it should not be presumed that Congress so intended in the absence of any unambiguous declaration to that effect. There is nothing in the statute which suggests such a discrimination. And if Congress had intended that taxpayers should be permitted to deduct expenses incurred in transactions entered into for profit, though not

connected with a trade or business, it would have specifically so provided, as it has done with reference to losses thus incurred. See Section 23 (e), Revenue Act of 1932, *infra*, p. 31. It is our position that mere personal investment activities never constitute carrying on a trade or business, no matter how much of one's time or of one's employee's time they may occupy. Statutes granting deductions are not to be extended by construction but should be strictly construed, and the taxpayer claiming the benefit of a deduction must come squarely within its terms. *Deputy* v. *duPont*, 308 U. S. 488; *New Colonial Co.* v. *Helvering*, 292 U. S. 435; *White* v. *United States*, 305 U. S. 281; *Helvering* v. *Ind. Life Ins. Co.*, 292 U. S. 371; *Welch* v. *Helvering*, 290 U. S. 111; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319. To hold that a taxpayer deriving income from his investments otherwise than as a trader or dealer is engaged in a trade or business is to extend the meaning of Section 23 (a) beyond the natural import of the language employed.

3. Moreover, a person is generally not considered as being engaged in "carrying on" a "trade or business" unless he has dealings with other people. For example, one who writes books and puts them in a warehouse instead of selling them is not occupied in trade or business. *Chaloner* v. *Helvering*, 69 F. (2d) 571 (App. D. C.). And a person who operates a farm and utilizes the products of his

endeavor himself is not engaged in business, even though the farm provides all of the necessaries of life. *Union Trust Co.* v. *Commissioner,* 54 F. (2d) 199 (C. C. A. 6th).

As two members of this Court stated in *Deputy* v. *duPont,* 308 U. S. 488, 499, carrying on a trade or business normally involves holding one's self out to others as engaged in the selling of goods or services. In the present case the petitioner has not held himself out to others as engaged in the selling of securities. Indeed, during the two taxable years involved not a single sale of securities was made by the petitioner. But even if the petitioner had been more active in changing his investments, he still would not be engaged in trade or business if these activities related merely to conserving, enhancing, and generally caring for his estate. Although the line may perhaps be difficult to draw in a close case, the principles are clear and were suggested at least some twelve years ago by Judge Learned Hand in *Bedell* v. *Commissioner,* 30 F. (2d) 622 (C. C. A. 2d). There the taxpayer, a retail clothing merchant, had testified that he spent nearly one-half of his time buying and selling real estate and negotiable securities for profit; that he bought and sold stocks and bonds through six or seven brokers' offices where he spent about three hours a day three or four days a week, and in one of which he had a private room in conjunction with several other persons. There appeared to be some conflict on that

evidence, but Judge Hand said that even if it were accepted at face it would still not prove that the taxpayer was thus engaged in carrying on a trade or business (p. 624);

> In the first place, we are by no means satisfied, even if we were bound by his oral testimony, that it proved him to have been regularly carrying on a "business" of any kind. A trader on an exchange, who makes a living in buying and selling securities or commodities, may be said to carry on a "business"; a person who frequents brokers' offices, and continually dabbles in real estate is conceivably quite different. Most men who have capital change their investments, and may speculate all the time; we should hardly call this a business, though the line is undoubtedly hard to draw. * * *

4. But the petitioner herein was far less active in his security dealings. His purchases, although large in amount, were narrowly limited to a small number of blocks of government bonds that were plainly intended only for investment purposes. In 1932 his purchases were restricted to bonds issued by the states of Massachusetts and New York and by the City of Boston; in 1933 he bought only United States Government bonds; and during both those years he did not make any sales of securities whatever. The petitioner therefore cannot be said to have been continuously engaged in buying and selling securities or in changing his investments, and he himself concedes (Br. 48–49) that isolated,

occasional transactions do not constitute engaging in business. Carrying on a business, in the very least, connotes activity, and the question whether one is so engaged must be judged by an objective standard. Devotion of thought and study to the security market which is not translated into action is obviously not the conduct of a business. Keeping of records of one's affairs, while it may be an incident of business, does not of itself constitute a business. The petitioner's argument that he was engaged in a trade or business because of the amount of time and attention devoted to his affairs is, we submit, therefore, without merit.

Accordingly, even if mere buying and selling for investment purposes when carried on with sufficient activity could constitute a trade or business—which we deny—the very limited activities of petitioner herein could not qualify as such. The record shows very little about his securities except (1) that he rarely if ever sold any of them and that his purchases were in large blocks intended for investment; (2) that over sixty percent of his securities held in 1932 and 1933 consisted of nontaxable bonds (R. 70, 72); (3) that in buying bonds he preferred long-term, registered bonds (R. 75); and (4) that he owned some railroad and other stocks in an undisclosed amount (R. 19–20, 159). The fact that he made no sales in either year suggests that his stocks were not highly speculative in character. His securities were purchased for him

by his New York bank, and his New York office made collections of his income and kept a record of his investments. It is true that he was in touch with his New York office daily, by letter or cable, but that office also handled his real estate matters, which constituted its principal activity (R. 72). The record does not disclose that the petitioner was continuously, regularly, and actively engaged with his securities, or that he was doing anything more than any other prudent investor would do. His activity and the activities of his employees in this regard, so far as this record reveals, was limited to a relatively few purchases of government bonds, to collecting interest and dividends, and to maintaining records and preparing reports for petitioner's convenience. Thus, even under the test urged by petitioner, he was not, we submit, carrying on a trade or business with respect to his securities.

5. The petitioner relies primarily upon the definition of "business" adopted by this Court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, as "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." But the total lack of relevance of that statement to the situation here presented will readily become apparent when that case is viewed in its proper setting. *Flint* v. *Stone Tracy Co.* arose under the corporation tax law of 1909 which had been enacted some three and one-half years prior to the adoption of

the Sixteenth Amendment. The statute had been enacted in belated response to the unpopular reception of this Court's decision in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, and represented an attempt to circumvent that decision prior to constitutional amendment. The tax was imposed only upon corporate income, and the formula for avoiding the lethal consequences of the *Pollock* decision was that it was an "excise" with respect to the carrying on of business by corporations. Obviously, the purpose of Congress was to subject to tax all corporate income as far as possible in the absence of the Sixteenth Amendment; and this Court's definition of "business" in *Flint* v. *Stone Tracy Co.* was undoubtedly framed in recognition of that sweeping objective.

The question in the instant case, on the other hand, does not present any such considerations. Here, all income is subject to tax under the statute, and the only question presented is the extent to which deductions are allowable from taxable income. Congress has spelled out numerous categories of deductions. In the case of some of them, such as losses arising out of fire, storm, shipwreck, or other casualty, or from theft, the loss is deductible in full regardless of whether it is connected with the taxpayer's business and regardless of whether the property had been acquired in a transaction entered into for profit. (Section 23 (e) (3) of the Revenue Act of 1932.) Again, deductions

are allowed generally with respect to losses incurred in a transaction entered into for profit though not connected with trade or business. (Section 23 (e) (2) of the Revenue Act of 1932.) But here the deduction, if any, is permitted only under Section 23 (a) which specifically requires that the expense in question must have been paid or incurred "in carrying on any trade or business."

It is plain, therefore, that the definition of "business" in *Flint* v. *Stone Tracy Co.*, when viewed against the background of the statute there under consideration can hardly have any relevance in this case. But even if it should be thought to have any bearing here, it should be read in connection with the later decision in *McCoach* v. *Minehill & S. H. Ry. Co.*, 228 U. S. 295,[4] where it was held that the mere receipt by a lessor railroad company of the income from its leased railway property, and the receipt of interest and dividends from invested funds, bank balances, and the like, and the payment of organization and administration expenses incidental to the receipt of such moneys and their distribution among the stockholders, do not constitute such a business as was taxable under the corporation tax law of 1909.

6. The petitioner argues (Br. 37–39, 52–55) that the management of his real estate and securities

[4] See also *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *United States* v. *Emery*, 237 U. S. 28; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187.

constituted a single "business," and that there was no justification for dividing the expenses of the New York and Paris offices between the real estate and the securities. There seems to be little merit to this contention. If the expense incurred in connection with the petitioner's securities was not a business expense, there is no basis for allowing the deduction under the statute. A personal expense cannot be converted into a business expense by a taxpayer's failure to separate the personal from the business. Indeed, there were certain disbursements by the New York office for concededly personal matters of the petitioner for which the Board disallowed deductions, and the petitioner makes no point of that disallowance (R. 85).

7. The further contention is made by the petitioner that (Br. 50–51) "The handling of a vast amount of securities, watching whether the income is promptly paid, collecting and accounting for principal and income * * * is a recognized form of business, conducted frequently by Trust Companies and Banks" for which "they make well known charges." From this premise, he argues that if those same things are done by the owner of the securities, the owner is engaged in a business. The conclusion, we submit, does not follow.

Thus, a valet is concededly engaged in a trade or business; yet his services to his employer are unquestionably personal from his employer's point of view, and his wages are plainly not deductible by

the employer as expenses incurred in the conduct of a trade or business. Similarly, when a trust company or bank handles securities for the owner, its business consists of selling its services. When an owner handles his own securities there is no selling of services, and, without more, there is no business. Again, the landscape gardener working on the petitioner's estate is engaged in a business, for he sells his services to the petitioner. If the petitioner should assist the gardener or should do the work entirely himself, it would not be for him a business but a personal activity, perhaps a pleasure. And likewise, in the present case, the petitioner's services on his own behalf did not constitute a business, nor did the payment by him to others for their services create a business.

8. The petitioner urges (Br. 57–61) that his position is supported by a long-continued administrative practice which has received the implied approval of Congress. We respectfully submit that although there have been some informal rulings which support petitioner's position, there have been in fact no regulations or Treasury Decisions in point, and that the actual practice of the Bureau of Internal Revenue has not been uniform on this issue. Accordingly, such "practice" can be of but little aid to this Court in construing the statute. Indeed, it is because of such lack of uniformity that the Treasury is now asking this Court to lay down a rule that will furnish an authoritative guide for future administration practice.

(a) None of the regulations issued since 1918 with respect to the income tax contains a definition of the phrase "carrying on any trade or business."[5] The rulings relied upon by petitioner were not promulgated by or with approval of the Secretary of the Treasury; they are not the kind of rulings that the Commissioner is directed to make by the revenue acts. Indeed, those rulings are not even signed by the Commissioner, and although they appear in the Internal Revenue Cumulative Bulletin, there is a cautionary notice in black type at the top of the front page of the bulletin to the effect that they "do not have the force and effect of Treasury Decisions". And this Court has recognized that such rulings are of little weight in interpreting the statute.[6] *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 467–468; *Biddle* v. *Commissioner*, 302 U. S. 573, 582; cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 52.

The petitioner cites only two rulings promulgated prior to the taxable years involved: O. D. 537, 2 Cum. Bull. 175 (1920), and O. D. 877, 4 Cum. Bull. 123 (1921).

---

[5] Art. 101, Regs. 45, 62, 65, and 69; Art. 121, Regs. 75 and 77; Art. 23 (a)–1, Regs. 86, 94, and 101; Art. 19.23 (a)–1, Regs. 103. Cf. Art. 8, Regs. 41, and pp. 18–19, Regs. 33 (1918 ed.).

[6] In reaching a result substantially in conflict with that of the court below in this case, the court in *Kales* v. *Commissioner*, 101 F. (2d) 35 (C. C. A. 6th), erroneously treated the rulings involved as having the dignity of official Treasury Decisions.

O. D. 537 is to the effect that in computing the taxable net income of an estate during administration, necessary expenses, such as office rent or the compensation of a business abent, might be deductible, "the test in every case being whether the expense is an ordinary and necessary incident to the collection of income due the estate."

O. D. 877 rules that a taxpayer whose income is derived principally from investments in stocks and bonds may deduct as a business expense the rent of an office and the cost of clerical help if he can show in his return that such expense is ordinary and necessary within the meaning of the Revenue Act.

We believe that these rulings have been discredited by later decisions of the courts (see pp. 15–16, *supra*) and should therefore have little, if any, weight in determining the outcome of the present case.

(b) An argument similar to that here advanced by the petitioner with respect to the administrative practice was made in *Van Wart* v. *Commissioner*, 295 U. S. 112, and was rejected by this Court. The question in that case was whether an attorney's fee paid by a guardian for conducting litigation to secure income for his ward was a business expense and therefore deductible from the minor's gross income.

In 1925 there had been a ruling in the Treasury Department (I. T. 2124, IV–1 Cum. Bull. 138) that the fee paid an attorney for services rendered in

securing the appointment, by order of court, of a guardian capable of receiving the distributive share of a minor under a will, represents an ordinary and necessary expense incurred by the guardian in connection with the income from the property of his ward.

The Board of Tax Appeals in 1929 decided, in *Wurts-Dundas* v. *Commissioner,* 17 B. T. A. 881, that attorneys' fees paid by the guardian of the taxpayer to assert her rights to income from a trust estate constituted an ordinary and necessary business expense; and this decision was affirmed by the Circuit Court of Appeals for the Second Circuit in 1931 (54 F. (2d) 515), the court stating that where a guardian incurs reasonable and necessary expenses in securing the income to which it is entitled as guardian, it is carrying on the business of administering the ward's estate, and that the expenses of the guardian are the expenses of that business. The unreported opinion of the Board in the *Van Wart* case, *supra,* followed the decision in the *Wurts-Dundas* case. The line of reasoning in the ruling published as I. T. 2124 and in the Board's decisions in the *Wurts-Dundas* and *Van Wart* cases parallels the line of reasoning in the rulings relied upon by the petitioner here and petitioner's own argument. This Court, nevertheless, reached the conclusion in the *Van Wart* case that the Board was in error and that neither the ward nor the guardian was shown to have been engaged

in a trade or business, and the claimed deduction was therefore disallowed. Subsequently, I. T. 2124 was revoked as being in conflict with the *Van Wart* case. Mim. 4580, 1937–1 Cum. Bull., p. 62.

(c) The ruling most heavily relied upon by petitioner is I. T. 2751, XIII–1 Cumulative Bulletin 43 (1934). Not only was that ruling published after the tax years here involved, 1932 and 1933, but it was similarly an informal ruling not signed either by the Commissioner or the Secretary, and therefore, no more binding upon this Court than the rulings discussed above. Moreover, the actual administrative practice of the Bureau of Internal Revenue has not been uniform in this regard. The very number of cases cited by both sides on this issue in which the question of "trade or business" was litigated in similar situations and in which the Commissioner contested the deduction confirms the fact that the actual practice of the Treasury was not uniform either before or after 1934 with respect to this issue. Cf. *Higgins* v. *Smith*, 308 U. S. 473, 478–479.

In view of that lack of uniformity, not only of actual Treasury practice but also of the decision in the lower tribunals, the Treasury now asks this Court for an authoritative ruling to clear up the confusion. In the circumstances, it would be ironic, indeed, to resort to the doubtful informal rulings which petitioner presses upon the Court as a basis for the decision herein. Those rulings

should play no greater part here than the similar ruling in the closely analogous *Van Wart* case.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
LEE A. JACKSON,
Special Assistants to the Attorney General.

JANUARY 1941.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(e) *Losses By Individuals.*—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any tranaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty,

or from theft. No loss shall be allowed as a deduction under this paragraph if at the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * * *

Treasury Regulations 77, promulgated under the Rev. Act of 1932:

ART. 121. *Business expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 141–272. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. (See article 55.) Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see article 122), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. A taxpayer is entitled to deduct the necessary expenses paid in

carrying on his business from his gross income from whatever source. As to items not deductible, see section 24 and articles 281–284.

ART. 125. *Professional expenses.*—A professional man may claim as deductions the cost of supplies used by him in the practice of his profession, expenses paid in the operation and repair of an automobile used in making professional calls, dues to professional societies and subscriptions to professional journals, the rent paid for office rooms, the cost of the fuel, light, water, telephone, etc., used in such offices, and the hire of office assistants. Amounts currently expended for books, furniture, and professional instruments and equipment, and useful life of which is short, may be deducted. As to items not deductible, see section 24 and articles 281–284.

* * * * *

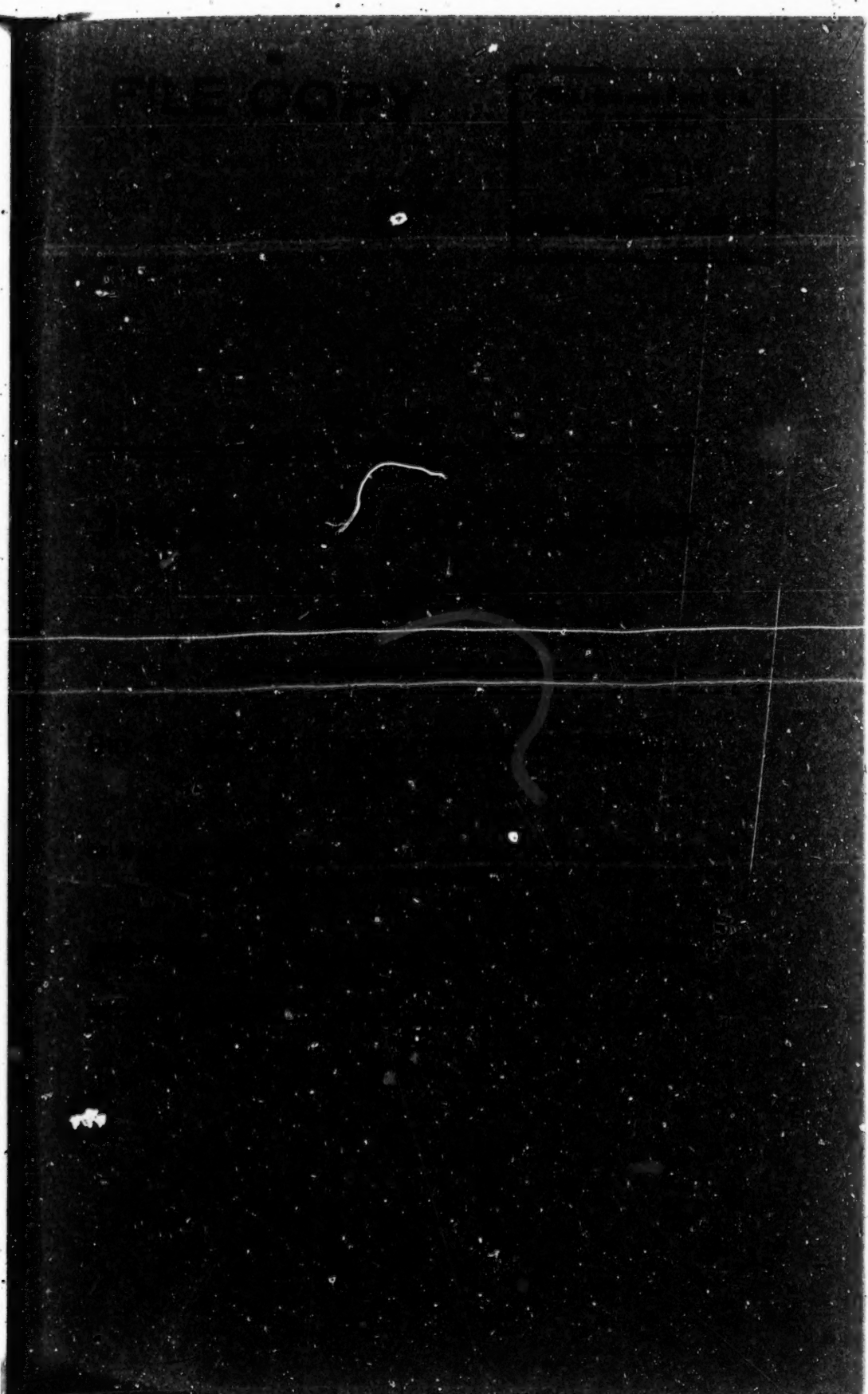
ART. 281. *Personal and family expenses.*—Insurance paid on a dwelling owned and occupied by a taxpayer is a personal expense and not deductible. Premiums paid for life insurance by the insured are not deductible. In the case of a professional man who rents a property for residential purposes, but incidentally receives clients, patients, or callers there in connection with his professional work (his place of business being elsewhere), no part of the rent is deductible as a business expense. If, however, he uses part of the house for his office, such portion of the rent as is properly attributable to such office is deductible. Where the father is legally entitled to the services of his minor children, any allowances which he gives them, whether said to be in consideration of services or

otherwise, are not allowable deductions in his return of income. Alimony and an allowance paid under a separation agreement are not deductible from gross income. (See article 83.) The cost of equipment of an Army officer to the extent only that it is especially required by his profession and does not merely take the place of articles required in civilian life is deductible. Accordingly, the cost of a sword is an allowable deduction, but the cost of a uniform is not.

U. S. GOVERNMENT PRINTING OFFICE. 1941

Blank Page

Blank Page



Blank Page

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

This memorandum is submitted in response to the request made by Mr. Justice Stone in the course of the argument of this case.

Mr. Justice Stone inquired whether there is any inconsistency in allowing deductions on account of real-estate expenses as incurred in "trade or business," on the one hand, and in requiring that the capital gains and losses provisions be applicable to any sales of such real estate, on the other hand.

We believe that there is no inconsistency, because the capital gains and losses provisions may be applicable even to sales of property held in connection with one's trade or business. Section 101

(c) (8) of the Revenue Act of 1932, the revenue act involved herein, defines capital assets as follows:

> (8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. * * *

The parenthetical clause in the foregoing provisions makes it clear that even though real estate is treated as "business" property it may nevertheless be subject to the statutory restrictions with respect to capital losses and enjoy the tax advantages to be derived from capital gains.[1] Only

[1] The capital gains and losses provisions in the revenue acts, since 1921, have contained the same parenthetical clause. See Sec. 206 (a) (6) of the Revenue Act of 1921; Sec. 208 (a) (8) of the Revenue Acts of 1924 and 1926; Sec. 101 (c) (8) of the Revenue Acts of 1928 and 1932; Sec. 117 (b) of the Revenue Acts of 1934 and 1936; and Sec. 117 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code. However, there appeared in the 1938 Act for the first time the further provision that there was to be excluded from the definition of capital assets "property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l)." Sec. 117 (a) (1). Under these provisions, it would seem that a "business" building (since it is depreciable under Section 23 (e)) would not be subject to the capital gains and losses provisions, whereas the land would be subject to those provisions. See Article 23 (e)–1 of Regulations 101; Section 19.23 (e)–1 of Regulations 103.

stock in trade, etc., is excluded from the capital gains and losses provisions. And, plainly, petitioner's real estate, so far as this record discloses, could not qualify as such.

Accordingly, we believe that there is no inconsistency between the allowance of expenses with respect to such real estate and the applicability of the capital gains and losses provisions upon the sales of such real estate.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 12 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 253.

EUGENE HIGGINS,

Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICUS CURIAE.

ROLLIN BROWNE,
Amicus Curiae,
20 Exchange Place,
New York, N. Y.

JOHN G. JACKSON, JR.,
GEORGE CRAVEN,
MITCHELL, TAYLOR, CAPRON & MARSH,
JACKSON, FULLER, NASH & BROPHY,
New York, N. Y.,
Of Counsel.

THE COURT PRESS, N. Y. C.

Blank Page

INDEX.

PAGE

In determining gains, profits or income derived from transactions, it is inherently necessary to take account of the cost or expense of such transactions 2

The real purpose back of the Government's contentions in this case 9

Conclusion 15

CITATIONS

CASES

Edwards v. *Chile Copper Co.*, 270 U. S. 452..... 2

Eisner v. *Macomber*, 252 U. S. 189..... 3

Flint v. *Stone Tracy Co.*, 220 U. S. 107..... 2

Helvering v. *Winmill*, 305 U. S. 79..... 6

Missouri Insurance Co. v. *Gehner*, 281 U. S. 313 10

Woolford Realty Co. v. *Rose*, 286 U. S. 349..... 5, 8

STATUTES

Revenue Act 1932:

Sections:

22(a) 3

23(a) 2, 6, 7, 8, 14, 15

23(c) 5, 7, 8

Revenue Act 1934:

Section 24(a)(5) 12

Regulations and Rulings

PAGE

Regulations 77 (Income Tax), Art. 131..... 6

G. C. M. 7668, IX-1 C. B. 221..... 10
G. C. M. 9954, X-2 C. B. 253..... 10
G. C. M. 10123, X-2 C. B. 254..... 10

L. T. 2751, XIII-1 C. B. 43.....12, 13

Congressional Committee Reports

H. R. 704, 73d Cong., 2d Sess., 1939-1 (Part 2) Int. Rev. Cum. Bull. P. 571..... 11

S. R. 558, 73d Cong., 2d Sess., 1939-1 (Part 2) Int. Rev. Cum. Bull. P. 606..... 11

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 253.

EUGENE HIGGINS,

Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICUS CURIAE.

This brief is filed by the undersigned as *amicus curiae* with the written consent of counsel for the respective parties.

The brief will be limited to a discussion of the administrative practice referred to in the petitioner's brief pursuant to which all reasonable and necessary expenses incurred in securing or earning income by a regular and continuous course of action have uniformly, since the inception of the income tax, been deductible as "business" expenses.

In Determining Gains, Profits or Income Derived From Transactions, It is Inherently Necessary to Take Account of the Cost or Expense of Such Transactions.

The administrative practice was based upon a broad interpretation of business as "any transaction entered into for profit", and "carrying on business" as a continuous, regular series of such transactions—the interpretation adopted by this Court at an early date (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171; *Edwards* v. *Chile Copper Co.*, 270 U. S. 452).

The broad interpretation is in harmony with the general understanding of the ordinary man, who speaks of a "business" trip as distinguished from a "pleasure" trip, a "business" letter as distinguished from a "personal" letter, a "business" engagement as distinguished from a "social" engagement, and who, even before the days of the income tax, regularly segregated his "business" expenses from his "personal, family and living" expenses.

The Government's contention would appear to be based on somewhat the following theories: That Congress has the power to impose, and has imposed, the tax on gross income, less only certain deductions specifically allowed in the statute; that no deductions not specifically allowed can be claimed by the taxpayer and the burden is on the taxpaper to show that he is entitled, by the clear and unambiguous language of the statute, to any deduction that he claims; that Section 23(a) allows the deduction of the ordinary and necessary expenses of carrying on any trade or business, and does not allow the deduction of any other expenses; that "carrying on any trade or business" does not comprehend all activities

in the production of income, no matter how regular and continuous such activities may be; that the phrase has a narrower meaning, being limited practically to "carrying on a trade, vocation or profession"; that to the extent that the Treasury has undertaken to allow deductions for expenses incurred in the production of taxable income, to a taxpayer not engaged in trade or business within such narrower definition, the practice embodies an incorrect interpretation of the statute and should not be followed.

We think the Government puts the shoe on the wrong foot. We believe that the cost or expense of securing or producing income must be taken into account *in order to determine the amount of the income,* except to such extent as may be expressly prohibited by statute.

It is unnecessary to argue whether Congress has the power under the Sixteenth Amendment to impose a tax on gross receipts. It is perfectly obvious that Congress has not attempted to impose such a tax. The income tax is and always has been laid on "gains or profits and income derived from any source whatever" (Section 22(a)).

In *Eisner* v. *Macomber,* 252 U. S. 189, this Court approved an earlier definition which it had placed upon the word income, as "*the gain* derived from capital, from labor, or from both combined", adding that it must be understood, however, to "include *profit* gained through a sale or conversion of capital assets". This definition, of course, was intended to have the broadest scope. "Capital" was intended to include property of all kinds and "labor" to comprise all effort. In short, the taxpayer is taxed upon any *gain* arising from his property or from his mental or physical efforts of any kind.

The receipts of a taxpayer may include or even constitute income, but that is not necessarily so. We are here speaking, not merely of "net income", the artificial concept of the income tax law, but of any actual income.

In order to determine whether and to what extent particular receipts constitute or comprise income, it is essential to take into account the cost of producing or securing those receipts. It is inherent in the very concept of income that, to the extent receipts represent merely a return of capital cost or other necessary expense, they do not constitute gain or profit. A manufacturer's income (even his "gross income") consists, not of the gross receipts from the sale of goods, but of such gross receipts minus the manufacturing cost of the goods sold. The receipts from a sale of property do not constitute income; the income is only the excess of such receipts over the cost of the property sold. These illustrations, which are recognized on the income tax blanks prepared by the Treasury, could be multiplied almost without end.

There is no difference in this regard between capital transactions and ordinary income transactions. In either case, the money expended by the taxpayer, being already his own, does not become income when returned to him.

We do not deny that Congress has full discretionary power to deny, restrict or condition the allowance of deductions to be taken *from* "gross income" in order to compute the "net income" on which the tax is laid. We concede that if a taxpayer who has derived a gain, profit or income seeks to diminish it by an unrelated expense, loss or other deduction, the burden is on him to show his right to it under some

express provision of the statute. But since Congress has laid the tax only on income in the sense of gains and profits, and since the gain or profit from a transaction or a series of transactions cannot be ascertained without taking account of the cost or expense thereof, it seems perfectly clear that the reasonably necessary expenses of earning or securing income, including the expense of managing and preserving income-producing property, real, personal or mixed, tangible or intangible, are allowable in some form in computing the taxpayer's income tax liability, except to the extent the allowance thereof is denied, restricted or conditioned by some express provision of the statute.

There is a real difference between a statutory deduction *from income* already determined and a necessary deduction of cost *in computing income* (*Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 328-9). This difference always has been recognized by the Treasury Department.

For example, if a "gentleman farmer" carrying on farming operations for pleasure and not for profit, and admittedly not engaged in business, takes in $2,000 from his farm operations in a year, but necessarily expends $1,000 in doing so, his *income* from his farm operations is $1,000, not $2,000, and yet there is no express provision of the income tax law allowing the "deduction" of any of his expenses. Moreover, if his expenses exceed his receipts, although the excess is not deductible *from other income* as a loss under Section 23(e), because it was not incurred in business or in a transaction entered into for profit, nevertheless, the expenses are allowable to the extent of the receipts, so that the taxpayer reports no "in-

come" from his farming operations (Regulations 7
Article 131).

In the case of a single, isolated transaction, co
cededly not effected in "carrying on any trade
business", the cost or necessary expense of the tran
action must be taken into account in determining th
gain, profit or income therefrom, and yet there is n
provision of the income tax law specifically allowin
a "deduction" for such expense or cost.

For example, if a man who lives in a rented hous
moves to another town and sublets the house he ha
been occupying for the balance of his term for les
than the rent he pays his landlord for such house
no one would contend that he has thereby made a gai
or profit.

Commissions paid to a broker on an isolated pur
chase and sale of property, though clearly not allow
able as expenses of carrying on a business, ar
nevertheless taken into account in computing the re
sulting gain or loss. (See *Hekering* v. *Winmill*, 30
U. S. 79.)

There is, however, a practical difference in th
treatment accorded under the income tax law to th
cost or expense of a single, isolated transaction an
the expenses of carrying on trade or business. Th
cost or expense of a single, isolated transaction, no
being specifically allowable as a "deduction" unde
Section 23(a), is taken into account in computing th
amount of the income from the transaction at the tim
the transaction is closed or completed.

The general expenses of a trade or business (a con
tinuous, regular course of activity undertaken fo
profit) are not allocated, *pro rata*, to the numerou
individual transactions effected in the course of th

trade or business, and taken into account proportionately when and as each transaction is completed, but are allowed as "deductions" in the year in which they are incurred or paid, while the income from the trade or business is taken into account in the year in which it accrues or is received.

Thus, in the case of a trade or business, the expenses do not always or necessarily offset the income derived from the transactions in the conduct of which the expenses are incurred. The business is treated and the income tax liability is computed on an annual basis. This avoids the necessity of undertaking to allocate such general recurring expenses to the various individual transactions constituting the conduct of trade or business.

The Treasury Department, in treating as business expenses the cost or expense of owning and preserving income-producing property and the production and collection of income therefrom regularly and over an extended period, has merely placed such expenses on an annual basis for income tax purposes and has not attempted to take into account any expenses not inherently allowable in the computation of income tax liability.

One contention advanced by the Government in other cases demonstrates conclusively the proposition just stated. While Section 23(a) allows deductions for ordinary and necessary expenses incurred in carrying on any trade or business, Section 23(e) allows deductions for losses, if incurred in trade or business, "or if incurred in any transaction entered into for profit, though not connected with the trade or business." The Government contends that the difference between these two provisions shows that Congress did not intend, in Section 23(a), that expenses of trans-

actions entered into for profit should be taken into account, unless they were incurred in carrying on trade or business. The argument leads to absurd results.

Assume a single, isolated transaction entered into for profit but concededly not in connection with the continuous conduct of trade or business, and assume that the gross receipts from the transaction amount to $2,000, before taking account of the necessary cost or expense. Under the Government's contention, if the total cost or expense was only $1,000, no part thereof may be taken into account, and the taxpayer is taxable on "income" of $2,000 derived from the transaction, whereas, it is clear that if the cost or expense of the transaction exceeded $2,000, all of such cost or expense must be taken into account, and the excess thereof over the gross receipts is allowable as a loss. That, of course, would be unreasonable and unjust. The intention to enact legislation which would achieve such a result will not lightly be imputed to Congress by this Court.

The reason for the express provision in Section 23(e) allowing losses in transactions entered into for profit, though not connected with a trade or business, whereas Section 23(a) contains no similar provision with respect to the deduction of expenses, is perfectly clear. There is no such thing as minus income (*Woolford Realty Co.* v. *Rose*, 286 U. S. 319), and there is no inherent right to diminish or offset income from one transaction by a loss from an entirely distinct transaction. Since Congress apparently wanted to allow such a loss, it was necessary to say so in Section 23(e). But, since the cost or expense of any transaction must necessarily be taken into account in computing the income from that particular trans-

action, there was no necessity for an express provision of the law to that effect.

It being clear that the necessary cost or expense of producing income must in all cases be taken into account in determining what part of the gross receipts constitutes income, it seems equally clear that the Treasury Department was justified in adopting an administrative practice under which the identifiable cost or expense of any single, isolated transaction is to be taken into account at the time such transaction is closed, in order to compute the income arising therefrom, while the cost or expense of a regular, continuous series of transactions should be taken into account on an annual basis. The practice is not only entirely reasonable, but is necessary to a practical, common-sense administration of the act.

There certainly is no justification for refusing to take into account, *on some basis*, the regular recurring expenses of a continuous series of income-producing transactions, while at the same time the cost or expense of any single, isolated transaction is taken into account. There is even less justification for refusing to take into account the cost or expense of an income-producing isolated transaction if it results in a profit, but taking such cost or expense into account if it results in a loss.

The Real Purpose Back of the Government's Contentions in This Case.

We cannot believe that there is a serious desire on the part of those responsible for the administration of the income tax law to confuse the fundamental concept of "income" by treating it as synonymous with gross receipts in an arbitrarily selected class of cases.

In fact, there is evidence which leads us to suspec that the contentions being raised in this and certai other recent cases result, not from any abandonmen by the Treasury of the fundamental principle em bodied in the former practice, but from a desire t achieve indirectly a different objective which con cededly cannot be accomplished directly under th statute.

After the practice of allowing as business expense all reasonable and necessary expenses of earning o securing income and managing and preserving income producing property had been in effect for man years, the Treasury concluded that it was unfai to allow a taxpayer to deduct from his *taxable incom* the cost or expense of earning *tax-exempt income* Accordingly, in 1931, a Treasury ruling was issued t the effect that the expenses of a taxpayer who receive both taxable and tax-exempt income should be allo cated between the two classes of income and the por tion thereof allocated to the tax-exempt income shoul not be allowed. This ruling (G. C. M. 9954, X- Cum. Bull. 253) overruled a previous ruling in whic it had been held that the statute did not justify suc allocation (G. C. M. 7668, IX-1 Cum. Bull. 221).

Later in the same year (1931), the matter was re considered and a new ruling was issued which greatl modified and practically overruled G. C. M. 9954, o the authority of this Court's decision in *Missou Insurance Company* v. *Gehner*, 281 U. S. 313 (G. C M. 10123, X-2 Cum. Bull. 254).

After concluding that there was no authority unde the then existing law to disallow the deduction o expenses allocable to the production of tax-exemp income, the Treasury in 1934 sought an amendmen

to the law which would forbid the allowance of otherwise allowable deductions to the extent that they were incurred in the production of tax-exempt income. The amendment was passed by the House. The report of the Committee on Ways and Means (House of Representatives, Report 704, 73rd Congress, 2nd Session; 1939-1 (Part 2) Int. Rev. Cum. Bull. p. 571) contains the following explanation:

> "This paragraph has been added to the bill to eliminate as deductions from gross income expenses allocable to the production of income wholly exempt from the income tax. Under the present law interest on State securities, salaries received by State employees, and income from leases of State school lands are exempt from Federal income tax, but expenses incurred in the production of such income are allowed as deductions from gross income."

However, the Senate amended the provision so as to exclude from its operations expenses incurred in earning tax-exempt *interest*. The report of the Senate Finance Committee (Senate Report 558, 73rd Congress, 2nd Session; 1939-1 (Part 2) Int. Rev. Cum. Bull. p. 606) contains the following explanation:

> "The House bill disallows amounts otherwise allowable as deductions which are allocable to one or more classes of tax-exempt income. * * * While your Committee is in general accord with the House provision, it is not believed that this disallowance should be made to apply to expenditures incurred in earning tax-exempt interest. To do so might seriously interfere with the sale of Federal and State securities, which would be unfortunate during the present emergency."

The amendment as enacted in the Revenue Act of 1934, and reenacted in subsequent acts (Section 24(a)(5)), merely provides that "any amount otherwise allowable as a deduction which is allocable to one or more classes of income *other than interest* * * * wholly exempt from the taxes imposed in this chapter" shall not be allowed.

Although Congress thus definitely expressed its wishes on the subject, the Treasury did not abandon its efforts to disallow such expenses. Shortly before the Revenue Bill of 1934 was introduced in Congress, the Treasury published I. T. 2751, XIII-1 Cum. Bull. 43, in which the settled administrative practice was referred to as "resting upon the sound basis that business expenses represent the cost of producing income", but in which it was held specifically that "all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, production and conservation of properties producing *taxable* income should be allowed as deductions in computing net income."

After the enactment of the 1934 Act, and despite the fact that the amendment contained therein did not disallow expenses incurred in earning tax-exempt *interest,* the Treasury adopted the policy of attempting to secure the disallowance of expenses allocable to tax-exempt interest wherever possible, by denying the deduction of all expenses incurred in the ownership and management of securities and the collection of income therefrom, on the ground that such expenses are not incurred "in carrying on any trade or business", *except where a taxpayer would consent to the allocation of such expenses between taxable and tax-exempt interest, in which case the Treasury has regularly allowed the portion of the expenses allocated to the taxable interest.*

The foregoing has been and continues to be the administrative practice up to the present time, despite the decisions below in this case and other similar cases. I. T. 2751 never has been revoked. On inquiry, we have been assured by the Treasury that it is still in effect and that instructions have been issued to the field service of the Internal Revenue Bureau to continue to follow it. Cases have been and still are being closed on the basis of allowing expenses of earning taxable income, including expenses of owning, managing and preserving securities producing such income, provided the taxpayer will consent to the disallowance of expenses incurred in connection with tax-exempt securities.

The handling of the instant case in the Treasury Department is an example of the practice of which we speak. The Commissioner allocated the expenses between the taxable and tax-exempt income of the taxpayer and denied the portion thereof which he allocated to the tax-exempt income. However, when the taxpayer appealed from his decision, the Commissioner made no attempt whatever, either in the Board of Tax Appeals or in the court below, to sustain that action; but, in order to achieve his objective, in part at least, insisted that all of the taxpayer's expenses allocable to both taxable and tax-exempt securities should be disallowed on the ground that in their management he was not engaged in trade or business.

No matter how much one may sympathize with the feeling of the Treasury officials that taxable income should not be diminished by the deduction of expenses incurred in earning tax-exempt income, one cannot approve their attempt to achieve their objective indirectly by adopting a position which is not only at

variance with the 1934 amendment relating to expenses allocable to tax-exempt income and the settled interpretation of the statute of many years' standing, but is not even consistently followed in actual practice, and is advanced merely as a club to coerce taxpayers.

Even if, contrary to the express provision of the statute, it were considered desirable to disallow expenses incurred in the production of tax-exempt interest, such disallowance could not be accomplished completely or properly merely by placing a narrow interpretation on the words "trade or business" as used in Section 23(a). That would result in the disallowance of expenses incurred in earning tax-exempt interest, only in the case of taxpayers not engaged in "business" within the narrow definition contended for, while such expenses would continue to be allowed to other taxpayers. Moreover, in order to disallow the expenses of earning tax-exempt interest to taxpayers engaged in managing and conserving income-producing securities, it would be necessary to establish a construction of the term "business" which would result in the disallowance also of the reasonable and necessary expenses of earning taxable income.

Conclusion.

The administrative interpretation of the term "business" in Section 23(a), set forth in published rulings, as including the activities incident to the management and conservation of income-producing securities, and the long-established practice of allowing the deduction of expenses incident thereto as business expenses are sound, have become firmly embedded in the law, and should not be disturbed. The decision of the court below is contrary to such interpretation and practice, is incorrect and should be reversed.

Respectfully submitted,

ROLLIN BROWNE,
Amicus Curiae,
20 Exchange Place,
New York, N. Y.

JOHN G. JACKSON, JR.,
GEORGE CRAVEN,
MITCHELL, TAYLOR, CAPRON & MARSH,
JACKSON, FULLER, NASH & BROPHY,
New York, N. Y.,
Of Counsel.

Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 27 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 253.

EUGENE HIGGINS,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

Blank Page

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 253.

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for Rehearing.

The above-named petitioner respectfully prays a rehearing of the above-entitled cause, for that in its opinion in this cause, filed herein on February 3, 1941, the Court has inadvertently been misled into stating that:

> "No regulation has ever been promulgated which interprets the meaning of 'carrying on a business.'"

and into, concluding therefrom that the repeated rulings of the Board of Tax Appeals and the acquiescences therein of the Commissioner of Internal Revenue, and repeated decisions of the United States District Courts and Circuit Courts of Appeal are not determinative and do not amount to settled administrative practice, and that "it should not "be assumed, from rulings of this class that Congressional "re-enactment of the language which they construed was "an adoption of their interpretation."

The attention of the Court is respectfully called to the following *regulations* approved by the Secretary of the Treasury in February, 1918:

"*Art. 8. Trade in the case of individuals.*

"In the case of an individual the terms 'trade,' 'business,' and 'trade or business' comprehend all his activities for gain, profit, or livelihood, entered into with sufficient frequency, or occupying such portion of his time or attention as to constitute a vocation, including occupations and professions. When such activities constitute a vocation they shall be construed to be a trade or business whether continuously carried on during the taxable year or not, and all the income arising therefrom shall be included in his return for excess-profits tax.

"In the following cases the gain or income is not subject to excess profits tax, and the capital from which such gain or income is derived shall not be included in 'invested capital'; (a) Gains or profits from transactions entered into for profit, but which are isolated, incidental, or so infrequent as not to constitute an occupation, and (b) the income from property arising merely from its ownership, including interest, rent and similar income from investments except in those cases

in which the management of such investments really constitutes a trade or business."

Regulations No. 41, Art. 8, (signed by the Commissioner and approved by the Secretary of the Treasury and released for publication on February 4, 1918).

It is true that "Regulations No. 41 was expressly made relative to the War Excess Profits Tax"; but the War Excess Profits Tax was imposed on the net income, (with some specified exemptions), determined under the provisions of the Income Tax Act.

The War Excess Profits Tax Act of October 3, 1917 was Title 2 of the Revenue Act of that year. Title 1 of that Revenue Act was the Income Tax Law.

By Section 200 of that Title 2, it was specifically provided that:

"The terms 'trade' and 'business' include professions and occupations."

By Section 201 of that Title 2, it was provided:

"That in addition to the taxes under existing law and under this Act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:"

By Section 206 of that Act, it was provided that:

"The net income of a partnership or individual shall be ascertained and returned for the calendar years nineteen hundred and eleven, nineteen hundred

and twelve, and nineteen hundred and thirteen and for the taxable year upon the same basis and in the same manner as provided in Title I of such Act of September eighth, nineteen hundred and sixteen as amended by this Act, except that the credit allowed by subdivision (b) of section five of such Act shall be deducted."

Title 1 of the Act of September 8, 1916 was the Income Tax Law.

Section 213 of that Title 2 provided for the making of Regulations by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

It was thus specifically provided that the taxable net income under the Excess Profits Tax law should be based on the net income as ascertained under the Income Tax Law, and the Regulations as to what should constitute a trade or business of which the expenses were deductible were thus made directly applicable to the section of the Income Tax Act permitting such deductions as are here in question.

The re-enactment of the Income Tax Law, in the 1918 form, in which Section 214 (a) took its present form, occurred about a year after the publication of this Art. 8 of Regulations 41.

The principle thus declared in this Regulation runs through all the decisions of the Board of Tax Appeals and of the United States District and Circuit Courts of Appeals on the construction of the term "carrying on any trade or business", up to the decision of the Board of Tax Appeals in the case at bar.

We have examined the briefs filed in behalf of the Commissioner in the Circuit Court of Appeals in the three

cases referred to by this Court, namely, the *Kales* case, 101 F. (2d) 35; *Foss* v. *Commissioner,* 75 F. (2d) 326 and *Washburn* v. *Commissioner,* 51 F. (2d) 949.

Aside from the fact that these briefs are but arguments of counsel, and not even rulings of the Commissioner, in no one of them do we find the bald proposition asserted that no amount of activities on the part of a taxpayer, however continuous, in managing his own securities could be deemed "carrying on business".

The nearest to assertion of this proposition appears in the brief on behalf of the Commissioner in the Circuit Court of Appeals, in the case of *Washburn* v. *Commissioner,* (in 1931), but the contention was there advanced concerning the construction of Section 204 (a), a separate enactment, and it was, in that brief, claimed that the construction to be given to the wording of that section, was different from that to be given to the expression in Section 18.

In the brief in *Foss* v. *Commissioner,* 75 F. (2d) 326, (in 1934) we have found no such contention.

In the brief in *Kales* v. *Commissioner,* 101 F. (2d) 35, (in 1938) counsel for the Commissioner (abandoning the contention that had been made in *Washburn* v. *Commissioner,* 51 F. (2d) 949), asserted that Section 204 (a) and 18 should be governed by like construction of the term "carrying on business".

In each of the three cases, the contentions actually advanced by counsel for the Commissioner were overruled by the Court.

All the decisions and rulings throughout the years, up to 1934, are clearly based on the principle embodied in this Regulation, Article 8 of Regulations 41; which has been so overlooked, but which principle we had deduced from the rulings and decisions themselves.

We may also be permitted to point out that the Court seems to have overlooked one fact shown in the Record, namely,—that the Commissioner's ruling on the 1932 return of the petitioner, before the case came before the Board of Tax Appeals, was that the petitioner was carrying on a single business in managing both his real estate and his securities (R. p. 21). The Commissioner then sought to divide the entire expenses of the petitioner's business in proportion to the amount of income derived respectively from taxable property and from non-taxable securities (R. p. 21). It was when the Board of Tax Appeals ruled that such division of the expenses was impossible (R. p. 84) that the Commissioner asserted the claim that the taxpayer's management of his own securities could not be held to be carrying on business, no matter how continuous and varied the petitioner's activities.

As the decision of this Court was largely based on the proposition that no Regulation has ever been promulgated which interprets the meaning of "carrying on a business", and the conclusion therefrom that the repeated decisions were, therefore, not determinative and did not amount to settled administrative practice; and that consequently Congressional re-enactment of the language of Section 214, a (in later acts Section 18) was not to be regarded as an adoption of that interpretation; it is respectfully sub-

mitted that this petition for a reargument should be granted in view of the overlooked Article 8 of Regulations No. 41 of February, 1918.

In view of that Article 8 of Regulations 41, it is also clear, as pointed out under Point I, A and B of our main brief, that the finding that the petitioner was not engaged in carrying on business in the management of his securities was a finding of mixed law and fact, and both by the Board of Tax Appeals and by the Circuit Court of Appeals based on an erroneous view of the law, as established and recognized by the Congress in its re-enactments, and so reviewable.

Respectfully submitted,

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

Blank Page

SUPREME COURT OF THE UNITED STATES.

No. 253.—October Term, 1940.

Eugene Higgins, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 3, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

Petitioner, the taxpayer, with extensive investments in real estate, bonds and stocks, devoted a considerable portion of his time to the oversight of his interests and hired others to assist him in offices rented for that purpose. For the tax years in question, 1932 and 1933, he claimed the salaries and expenses incident to looking after his properties were deductible under Section 23(a) of the Revenue Act of 1932.[1] The Commissioner refused the deductions. The applicable phrases are: "In computing net income there shall be allowed as deductions: (a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." There is no dispute over whether the claimed deductions are ordinary and necessary expenses. As the Commissioner also conceded before the Board of Tax Appeals that the real estate activities of the petitioner in renting buildings[2] constituted a business, the Board allowed such portions of the claimed deductions as were fairly allocable to the handling of the real estate. The same offices and staffs handled both real estate and security matters. After this adjustment there remained for the year 1932 over twenty and for the year 1933 over sixteen thousand dollars expended for managing the stocks and bonds.

Petitioner's financial affairs were conducted through his New York office pursuant to his personal detailed instructions. His residence was in Paris, France, where he had a second office. By cable, telephone and mail, petitioner kept a watchful eye over his securities. While he sought permanent investments, changes, redemptions, maturities and accumulations caused limited shiftings in his port-

[1] 47 Stat. 169, c. 209.

[2] Cf. Pinchot v. Commissioner, 113 F. (2d) 718.

folio. These were made under his own orders. The offices ke
records, received securities, interest and dividend checks, made d
posits, forwarded weekly and annual reports and undertook ge
erally the care of the investments as instructed by the owner. Pu
chases were made by a financial institution. Petitioner did not pa
ticipate directly or indirectly in the management of the corporatio
in which he held stock or bonds. The method of handling h
affairs under examination had been employed by petitioner for mo
than thirty years. No objection to the deductions had previous
been made by the Government.

The Board of Tax Appeals[3] held that these activities did not co
stitute carrying on a business and that the expenses were capab
of apportionment between the real estate and the investments. Th
Circuit Court of Appeals affirmed,[4] and we granted certiorari b
cause of conflict.[5]

Petitioner urges that the "elements of continuity, constant rep
tition, regularity and extent" differentiate his activities from t
occasional like actions of the small investor. His activity is an
the occasional action is not "carrying on business." On the oth
hand, the respondent urges that "mere personal investment activ
ties never constitute carrying on a trade or business, no matter ho
much of one's time or of one's employees' time they may occupy."

Since the first income tax act, the provisions authorizing busine
deductions have varied only slightly. The Revenue Act of 191
allowed as a deduction "the necessary expenses actually paid
carrying on any business." By 1918 the present form was fixed an
has so continued.[7] No regulation has ever been promulgated whi
interprets the meaning of "carrying on a business," nor any ru
ings approved by the Secretary of the Treasury, i.e., Treasury D
cisions.[8] Certain rulings of less dignity, favorable to petitioner
appeared in individual cases but they are not determinative.

[3] 39 B. T. A. 1005.

[4] 111 F. (2d) 795.

[5] Kales *v.* Commissioner, 101 F. (2d) 35; duPont *v* Deputy, 103 F. (2d) 25

[6] 38 Stat. 167, Section II B.

[7] 40 Stat. 1066, Sec. 214(a)(1).

[8] Cf. Helvering *v.* New York Trust Co., 292 U. S. 455, 467-468.

[9] O. D. 537, 2 C. B. 175 (1920); O. D. 877, 4 C. B. 123 (1921); I. T. 275
XIII-1 C. B. 43 (1934). See also 1934 C. C. H. Federal Tax Service, Vol.
¶ 6035, p. 8027.

[10] Biddle *v.* Commissioner, 302 U. S. 573, 582. Cf. Estate of Sanford
Commissioner, 308 U. S. 39, 52. But see Helvering *v.* Bliss, 293 U. S. 144, 15
and McFeely *v.* Commissioner, 296 U. S. 102, 108.

Even acquiescence[11] in some Board rulings after defeat does not amount to settled administrative practice.[12] Unless the administrative practice is long continued and substantially uniform in the Bureau and without challenge by the Government in the Board and courts, it should not be assumed, from rulings of this class, that Congressional reenactment of the language which they construed was an adoption of their interpretation.

While the Commissioner has combated views similar to petitioner's in the courts, sometimes successfully[13] and sometimes unsuccessfully,[14] the petitioner urges that the Bureau accepted for years the doctrine that the management of one's own securities might be a business where there was sufficient extent, continuity, variety and regularity. We fail to find such a fixed administrative construction in the examples cited. It is true that the decisions are frequently put on the ground that the taxpayer's activities were sporadic but it does not follow that had those activities been continuous the Commissioner would not have used the argument advanced here, i.e., that no amount of personal investment management would turn those activities into a business. Evidently such was the Government's contention in the *Kales* case,[15] where the things the taxpayer did met petitioner's tests, and in *Foss* v. *Commissioner*[16] and *Washburn* v. *Commissioner*[17] where the opinions turned on the extent of the taxpayer's participation in the management of the corporations in which investments were held.[18]

Petitioner relies strongly on the definition of business in *Flint* v. *Stone Tracy Company*.[19] "'Business' is a very comprehensive term and embraces everything about which a person can be employed." This definition was given in considering whether certain corpora-

11 Kissel *v.* Commissioner, 15 B. T. A. 1270, acquiesced in VIII-2 C. B. 28 (1929); Croker *v.* Commissioner, 27 B. T. A. 588, acquiesced in XII-1 C. B. 4 (1933).

12 Higgins *v.* Smith, 308 U. S. 473, 478-479.

13 Bedell *v.* Commissioner, 30 F. (2d) 622, 624; Monell *v.* Helvering, 70 F. (2d) 631; Kane *v.* Commissioner, 100 F. (2d) 382.

14 Kales *v.* Commissioner, 101 F. (2d) 35; duPont *v.* Depr't, 103 F. (2d) 257, 259, reversed on other grounds, 308 U. S. 488.

15 Kales *v.* Commissioner, 34 B. T. A. 1046, 101 F. (2d) 35.

16 75 F. (2d) 326.

17 51 F. (2d) 949, 953.

18 Cf. Roebling *v.* Commissioner, 37 B. T. A. 82; Heilbroner *v.* Commissioner, 34 B. T. A. 1200.

19 220 U. S. 107, 171.

tions came under the Corporation Tax law which levies a tax on corporations engaged in business. The immediate issue was whether corporations engaged principally in the "holding and management of real estate"[20] were subject to the act. A definition given for such an issue is not controlling in this dissimilar inquiry.[21]

To determine whether the activities of a taxpayer are "carrying on a business" requires an examination of the facts in each case. As the Circuit Court of Appeals observed, all expenses of every business transaction are not deductible. Only those are deductible which relate to carrying on a business. The Bureau of Internal Revenue has this duty of determining what is carrying on a business, subject to reexamination of the facts by the Board of Tax Appeals[22] and ultimately to review on the law by the courts on which jurisdiction is conferred.[23] The Commissioner and the Board appraised the evidence here as insufficient to establish petitioner's activities as those of carrying on a business. The petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments. No matter how large the estate or how continuous or extended the work required may be, such facts are not sufficient as a matter of law to permit the courts to reverse the decision of the Board. Its conclusion is adequately supported by this record, and rests upon a conception of carrying on business similar to that expressed by this Court for an antecedent section.[24]

The petitioner makes the point that his activities in managing his estate, both realty and personalty, were a unified business. Since it was admittedly a business in so far as the realty is concerned, he urges, there is no statutory authority to sever expenses allocable to the securities. But we see no reason why expenses not attributable, as we have just held these are not, to carrying on business cannot be apportioned. It is not unusual to allocate expenses paid for services partly personal and partly business.[25]

Affirmed.

---

[20] *Id.* 169.

[21] Cohens *v.* Virginia, 6 Wheat. 264, 399; Puerto Rico *v.* Shell Co., 302 U. S. 253, 269.

[22] Revenue Act of 1932, 47 Stat. 169, § 272; Internal Revenue Code, § 272.

[23] Internal Revenue Code, § 1141.

[24] Van Wart *v.* Commissioner, 295 U. S. 112, 115.

[25] 3 Paul & Mertens, Law of Federal Income Taxation § 23.65; cf. National Outdoor Advertising Bureau *v.* Helvering, 89 F. (2d) 878, 881.